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Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines

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ARTICLE

DEAD LAW WALKING: THE SURPRISING TENACITY OF THE FEDERAL SENTENCING GUIDELINES

*Frank O. Bowman, III**

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I. INTRODUCTION

By the time this Article appears, nearly a decade will have passed since the U.S. Supreme Court declared the Federal Sentencing Guidelines constitutionally dead, and in its next breath resurrected them in advisory form.¹ From the point of view of the federal bench and bar, and of the academics who earn their daily crust watching lawyers at play, the years since the *Booker* decision have been a turbulent time. The Supreme Court itself has issued more than twenty decisions construing, clarifying, or applying one aspect or another of *Booker* doctrine.²

1. *United States v. Booker*, 543 U.S. 220, 264 (2005).

2. *See, e.g., Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013) (holding that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury); *Peugh v. United States*, 133 S. Ct. 2072, 2081, 2088 (2013) (holding that the *Ex Post Facto* Clause is violated when a defendant is sentenced under Federal Sentencing Guidelines promulgated after he committed his criminal acts and the new version provides a higher sentencing range than the version in place at time of offense); *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350, 2357 (2012) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (holding that the rule of *Apprendi v. New Jersey*, which holds that facts increasing the statutory maximum sentence must be submitted to the jury, applies to the imposition of criminal fines); *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012) (holding that the Fair Sentencing Act’s new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders); *Pepper v. United States*, 131 S. Ct. 1229, 1249 (2011) (holding that when defendant’s sentence has been set aside on appeal, district court at resentencing may consider evidence of defendant’s post-sentencing rehabilitation which may support a downward variance from the advisory guidelines range); *Abbott v. United States*, 131 S. Ct. 18, 25, 29 (2010) (holding that a defendant is subject to the highest mandatory minimum sentence specified for his conduct under 18 U.S.C. § 924(c)(1)(A), unless another provision of law directed to such conduct imposes a greater mandatory minimum); *Skilling v. United States*, 130 S. Ct. 2896, 2907–09, 2925, 2927, 2931–32 (2010) (holding that former corporate executive failed to establish that pretrial publicity prevented him from obtaining a fair trial on federal fraud-related charges, and that the “honest services” fraud proscription in 18 U.S.C. § 1346 is limited to bribery and kickbacks); *United States v. O’Brien*, 560 U.S. 218, 224–26, 235 (2010) (holding that the fact that a firearm was a machinegun is an element to be proved beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing); *Dillon v. United States*, 560 U.S. 817, 821, 824, 828–30 (2010) (holding that *Booker* does not apply to 18 U.S.C. § 3582(c)(2) proceedings and therefore does not require treating U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 as advisory); *Spears v. United States*, 555 U.S. 261, 262, 265–66 (2009) (holding that federal district courts are entitled, in criminal sentencing, to reject and vary categorically from the ratio between quantities of powder cocaine and crack cocaine on the basis of a policy disagreement with the Federal Sentencing Guidelines); *Oregon v. Ice*, 555 U.S. 160, 168 (2009) (holding that in light of historical practice and States’ authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit States from assigning to judges the finding of facts necessary to the imposition of consecutive sentences for multiple offenses); *Moore v. United States*, 555 U.S. 1, 3–4 (2008) (holding that the resentencing of an accused by a federal district court was warranted as the court did not think it had discretion to reject the crack/powder disparity in the Federal Sentencing Guidelines concerning cocaine possession); *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) (holding that absent a federal government appeal or cross-appeal, a federal court of appeals cannot, on its own initiative, order an increase in a defendant’s sentence); *Irizarry*

Federal appellate courts have cited *Booker* more than 10,000 times and federal district courts have published more than 8,000 opinions mentioning *Booker*.³ Academics have written over 2,200 journal articles citing *Booker* and more than 220 with *Booker* in the title.⁴ From a lawyer's perspective, it is hardly surprising that *Booker* should have generated so much high-voltage controversy. To undertake a conversation about *Booker* is to plunge into an intellectual bouillabaisse in which constitutional theory, criminal sentencing theory, inter-branch rivalries between the executive, judicial, and legislative arms of the federal government, tricky points of statutory interpretation, and pragmatic considerations of crime control, criminal justice administration, and the fate of individual criminal defendants are all bubbling merrily about.⁵ Moreover, the transformation of the Federal Sentencing Guidelines from a binding to a purely advisory system has not merely been the source of countless procedural wrangles and the fodder for a long cerebral feast, but it has unquestionably altered thousands of individual sentencing outcomes.⁶ And yet, from the points of view of federal defendants

v. United States, 553 U.S. 708, 709–10, 712–13 (2008) (holding that Rule 32(h) of Federal Rules of Criminal Procedure does not apply to every sentence that was at variance with the recommended Federal Sentencing Guidelines range); Kimbrough v. United States, 552 U.S. 85, 91 (2007) (holding that where drug traffickers dealing in crack cocaine were subject to same criminal sentence as those dealing in 100 times more powder cocaine, cocaine Guidelines are held to be advisory only); Gall v. United States, 552 U.S. 38, 41 (2007) (holding that federal courts of appeals are required to review all federal criminal sentences under a deferential abuse-of-discretion standard); Rita v. United States, 551 U.S. 338, 341 (2007) (holding that a court of appeals may apply a presumption of reasonableness to a district court sentence within the recommended Federal Sentencing Guidelines); Cunningham v. California, 549 U.S. 270, 274 (2007) (holding that California's determinate sentencing law violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments); Shepard v. United States, 544 U.S. 13, 15–16 (2005) (holding that a sentencing court, in inquiring under the Armed Career Criminal Act of 18 U.S.C. § 924(e), is not permitted to look to police reports or complaint applications).

3. A Westlaw search for “543 U.S. 220” in the database for federal appellate decisions (CTA) conducted on January 17, 2014, produced a list of more than 10,000 documents. The same search in the database for federal district court opinions produced 8,513 documents.

4. A Westlaw search for “543 U.S. 220” or “125 S. Ct. 738” in the database for law journal articles (JLR) conducted on April 1, 2014, produced a list of 2,257 articles citing the *Booker* decision and 224 articles with *Booker* in the title.

5. For one survey of the *Booker* terrain, see Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 429–30 (2010) [hereinafter Bowman, *Debacle*] (exploring how the merits and remedial opinions in *Booker* offered an opportunity to improve federal sentencing procedures).

6. *Supra* text accompanying notes 3–4 (highlighting the numerous cases and journal articles discussing *Booker*); see Adam K. Miller, *A New System of Federal Sentencing: The Impact on Third Circuit Sentencing Procedure in the Wake of the Supreme Court's Landmark Decision in United States v. Booker*, 51 VILL. L. REV. 1107,

in the mass and of the system that processes them from arrest to prison gate, perhaps the most surprising fact about *Booker* is just how small an effect it has actually had. This Article examines the tenacity of the Sentencing Guidelines regime and considers its implications for those who practice in the federal courts and those who aspire to change federal sentencing outcomes.

II. *BOOKER* AND THE FEDERAL SENTENCING GUIDELINES

The twisted tale of *Booker* and its progeny is formally about exposition of the jury trial right in the Sixth Amendment. But the real issue has always been whether the Court would succeed in using the Sixth Amendment lever to destabilize and ultimately topple a federal sentencing regime founded by the Sentencing Reform Act of 1984 (SRA) and based on an interlocking set of sentencing guidelines and statutory mandatory minimum sentences,⁷ a regime widely criticized by the defense bar and many in the judiciary and the academy for being unduly inflexible and unremittingly harsh.⁸ Given the ubiquity of this critique and the Supreme Court's evisceration of the Guidelines' legal status, one would have expected that nine years after *Booker* a whole new world would have dawned. After all, in order to maintain the (doubtful) intellectual consistency of its *Booker* holding, the Court has been obliged to declare the Guidelines a hitherto unknown form of nonlaw.⁹

1110–11, 1121 (2006) (examining statistical changes to federal sentences in the Third Circuit post-*Booker*).

7. Bowman, *Debate*, *supra* note 5, at 383, 418–28 (contending that the federal judiciary's experience with the Federal Sentencing Guidelines drove the Sixth Amendment debate that produced *Blakely* and *Booker*).

8. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3, 5 (1998) (describing the Federal Sentencing Guidelines as “almost a parody”); Bowman, *Debate*, *supra* note 5, at 419 (describing the system as “the most . . . restrictive set of sentencing mechanisms ever devised”).

9. See Bowman, *Debate*, *supra* note 5, at 434–41, 444–47 (describing how *Booker* and its progeny have transformed the Guidelines into rules with the appearance of law, but without law's normal attributes); Jeffery T. Ulmer & Michael T. Light, *The Stability of Case Processing and Sentencing Post-Booker*, 14 J. GENDER RACE & JUST. 143, 145–48 (2010) (explaining how the Court clarified the meaning of advisory guidelines after the *Booker* decision through subsequent cases); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 187 (2007) (highlighting the intellectual complexity of the Federal Sentencing Guidelines, including the concept of non-law); see also *United States v. Rita*, 551 U.S. 338, 350 (2007) (“The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).”); *United States v. Booker*, 543 U.S. 220, 300–01 (2005) (Stevens, J., dissenting) (claiming that due to the majority's decision, the Guidelines range “is now nothing more than a suggestion that may or may not be persuasive to a judge when weighted against numerous other considerations”).

The fall of the Guidelines began with the Court's 2004 decision in *Blakely v. Washington*,¹⁰ which voided the Washington state sentencing guidelines on the ground that they violated the Sixth Amendment right to a jury trial by requiring a judicial finding of a non-element fact as a prerequisite for certain upward adjustments of the guideline range or for sentences above such ranges.¹¹ This decision placed the validity of the Sentencing Guidelines in grave doubt.¹² A year later, the *Booker* merits majority found the Guidelines unconstitutional,¹³ but the *Booker* remedial majority voided only two subsections of the SRA—18 U.S.C. § 3553(b)(1), which “requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure),”¹⁴ and 18 U.S.C. § 3742(e), which sets forth standards of review on appeal for sentences imposed under the Guidelines¹⁵—and then substituted its own standard of appellate review—that of “reasonableness”—for the standard in excised Section 3742(e).¹⁶ Thereafter, in *Rita v. United States*,¹⁷ the Court found that a sentence within a properly calculated guideline range *could not* be treated by *sentencing judges* as presumptively *correct*, but *could*, though it need not, be treated by *appellate courts* as presumptively *reasonable*.¹⁸ Then, in 2007, in *Kimbrough v. United States*, the Court found that a district court could justify a sentence outside a properly calculated guideline range based on the judge's disagreement with the policy judgments of the Sentencing Commission undergirding a particular guideline.¹⁹ Additionally, in *Gall v. United States*, the Court found that appellate courts could not require district courts to provide justifications for sentences proportional to the extent of difference between the sentence imposed and the guideline range, because such a requirement comes “too close to creating

10. Bowman, *Debate*, *supra* note 5, at 429 (describing observers' suspicions before *Booker* that the Federal Sentencing Guidelines conflicted with the new rule in *Blakely*).

11. *Blakely v. Washington*, 542 U.S. 296, 301, 303–05 (2004) (affirming that the “statutory maximum” refers to the maximum sentence a judge may impose upon conviction without additional findings of fact).

12. See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 220–22 (2004) (describing how the *Blakely* holding put the constitutionality of the Federal Sentencing Guidelines in doubt).

13. *Booker*, 543 U.S. at 226–27; *Blakely*, 542 U.S. at 296.

14. 18 U.S.C. § 3553(b)(1) (2012); *Booker*, 543 U.S. at 259.

15. 18 U.S.C. § 3742(e); *Booker*, 543 U.S. at 258–62.

16. *Booker*, 543 U.S. at 260–62.

17. *Rita v. United States*, 551 U.S. 338 (2007).

18. *Id.* at 341, 353–54.

19. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”²⁰

The upshot of these opinions has been that, although post-*Booker* sentencing judges remain obligated to find all the same facts and apply all the same Guidelines rules to determine a legally correct guideline range as they did before *Booker*, they are now effectively empowered to ignore the results of all this effort when imposing the actual sentence.²¹ Appellate courts can, in theory, overturn a sentence as “substantively unreasonable,”²² but such reversals are vanishingly rare.²³ In practical fact,

20. *Gall v. United States*, 552 U.S. 38, 45–47 (2007).

21. See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 677 (2006) (describing how after *Booker* a judge can “thumb his nose” at the Federal Sentencing Guidelines).

22. In *Booker*, the Court held that appellate courts should henceforth review federal sentences only for “reasonableness.” *United States v. Booker*, 543 U.S. 220, 262 (2005). In *Rita v. United States*, Justice Scalia, in concurrence, distinguished between what he characterized as procedural reasonableness review—i.e., review of whether the trial court adhered to the procedures required to find a correct advisory range under the Guidelines—and substantive reasonableness review—review of whether the particular sentence imposed was reasonable based on all the facts and circumstances available to the judge in the sentencing record. *Rita*, 551 U.S. at 381–84 (Scalia, J., concurring). Justice Scalia contended that “reasonableness review cannot contain a substantive component at all.” *Id.* at 370. His view did not command a majority, then or since, but his nomenclature has stuck. See Bowman, *Debacle*, *supra* note 5, at 444–47 (analyzing Justice Scalia’s concurrence).

23. According to U.S. Sentencing Commission data, substantive reasonableness arguments were made to appellate courts in 1,760 cases in 2011, see U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.59 (2012) [hereinafter 2011 SOURCEBOOK], available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm, and 1,613 cases in 2012, see U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.59 (2013) [hereinafter 2012 SOURCEBOOK], available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm. However, the Commission’s figures show that, in each of these years, appellate courts reversed district court sentences for substantive unreasonableness in roughly 1% of the cases in which such arguments were raised on appeal. See 2011 SOURCEBOOK, *supra*, tbl.59; 2012 SOURCEBOOK, *supra*, tbl.59. The Commission does not list the exact number of cases in which reversals were secured in a particular year; however, their statistics indicate that, at a maximum, only sixteen to eighteen defendants out of the more than 80,000 sentenced each year in federal court, 2011 SOURCEBOOK, *supra*, tbl.1; 2012 SOURCEBOOK, *supra*, tbl.1, secure reversal based on the substantive unreasonableness of their sentences.

The actual number appears to be even lower. The Sentencing Resource Counsel Project of the Federal Public and Community Defenders maintains a list of all sentences reversed on appeal following the Supreme Court’s decision in *Gall v. United States*, 552 U.S. 38, 41 (2007). As of December 2013, the list, reproduced below, included only forty-eight cases decided since *Gall* in which an appellate court reversed a sentence based on substantive unreasonableness, which works out to only eight reversals for substantive unreasonableness per year.

Sentence within range reversed as substantively unreasonable: *United States v. Sanders*, 472 F. App’x 376, 381–82 (6th Cir. 2012); *United States v. Wright*, 426 F. App’x 412, 417 (6th Cir. 2011); *United States v. Dorvee*, 616 F.3d 174, 176 (2d Cir. 2010); *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1052 (9th Cir. 2009); *United States v. Paul*, 561 F.3d 970, 973 (9th Cir. 2009).

district court judges are now at liberty to adhere to or ignore guideline ranges as the spirit moves them, subject only to the requirement that a sentence outside the range be accompanied by some explanation which (a) is couched in the gloriously inclusive terminology of 18 U.S.C. § 3553(a),²⁴ and (b) is not on

Sentence outside range reversed as substantively unreasonable on appeal by defendant: *United States v. Van*, No. 12-2322, 2013 WL 5539617, at *2, *4 (6th Cir. Oct. 8, 2013); *United States v. Chandler*, 732 F.3d 434, 436, 440 (5th Cir. 2013); *United States v. Cruz-Valdivia*, 526 F. App'x 735, 737–38 (9th Cir. 2013); *United States v. Melchor*, 515 F. App'x 444, 445, 449–50 (6th Cir. 2013); *United States v. Gerezano-Rosales*, 692 F.3d 393, 396, 402 (5th Cir. 2012); *United States v. Esso*, 486 F. App'x 200, 201, 203 (2d Cir. 2012); *United States v. Aleo*, 681 F.3d 290, 293 (6th Cir. 2012); *United States v. Censke*, 449 F. App'x 456, 458, 469–71 (6th Cir. 2011); *United States v. Walker*, 649 F.3d 511, 512–14 (6th Cir. 2011); *United States v. Worex*, 420 F. App'x 546, 547, 550–51 (6th Cir. 2011); *United States v. Bradley*, 628 F.3d 394, 395, 401 (7th Cir. 2010); *United States v. Miller*, 601 F.3d 734, 735, 740 (7th Cir. 2010); *United States v. Calderon-Minchola*, 351 F. App'x 610, 611 (3d Cir. 2009); *United States v. Lopez*, 343 F. App'x 484, 485–86 (11th Cir. 2009); *United States v. Olhovsky*, 562 F.3d 530, 532–33, 541, 553 (3d Cir. 2009); *United States v. Ofray-Campos*, 534 F.3d 1, 39–40, 42, 44–45 (1st Cir. 2008); *United States v. Ortega-Rogel*, 281 F. App'x 471, 472, 474–75 (6th Cir. 2008).

Sentence outside range reversed as substantively unreasonable on appeal by government: *United States v. McQueen*, 727 F.3d 1144, 1147, 1155–56 (11th Cir. 2013); *United States v. Cole*, 721 F.3d 1016, 1019, 1025 (8th Cir. 2013); *United States v. Bistline*, 720 F.3d 631, 632 (6th Cir. 2013); *United States v. Kuhlman*, 711 F.3d 1321, 1323, 1326 (11th Cir. 2013); *United States v. Poppel*, 707 F.3d 627, 631 (6th Cir. 2013); *United States v. Ressam*, 679 F.3d 1069, 1071–72 (9th Cir. 2012) (en banc); *United States v. Robinson*, 669 F.3d 767, 769 (6th Cir. 2012); *United States v. Bistline*, 665 F.3d 758, 760 (6th Cir. 2012); *United States v. Kane*, 639 F.3d 1121, 1127, 1137 (8th Cir. 2011); *United States v. Irey*, 612 F.3d 1160, 1166 (11th Cir. 2010) (en banc); *United States v. Christman*, 607 F.3d 1110, 1112 (6th Cir. 2010); *United States v. Hayes*, 383 F. App'x 204, 206, 208 (3d Cir. 2010); *United States v. Engle*, 592 F.3d 495, 499, 505 (4th Cir. 2010); *United States v. Camiscione*, 591 F.3d 823, 824–25 (6th Cir. 2010); *United States v. Livesay*, 587 F.3d 1274, 1277–79 (11th Cir. 2009); *United States v. Lychock*, 578 F.3d 214, 216 (3d Cir. 2009); *United States v. Harris*, 339 F. App'x 533, 536–37, 539–40 (6th Cir. 2009); *United States v. Friedman*, 554 F.3d 1301, 1302, 1310 (10th Cir. 2009); *United States v. McVay*, 294 F. App'x 488, 489–90 (11th Cir. 2008); *United States v. Hughes*, 283 F. App'x 345, 347, 349 (6th Cir. 2008); *United States v. Abu Ali*, 528 F.3d 210, 221, 269 (4th Cir. 2008); *United States v. Omole*, 523 F.3d 691, 693 (7th Cir. 2008); *United States v. Hunt*, 521 F.3d 636, 639, 641, 650 (6th Cir. 2008); *United States v. Cutler*, 520 F.3d 136, 139–40, 176 (2d Cir. 2008); *United States v. Pugh*, 515 F.3d 1179, 1182–83 (11th Cir. 2008).

24. Section 3553(a) reads as follows:

Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

its face barking mad.²⁵ For district judges, the Guidelines have become the legal equivalent of one of the duller and slower-moving forms of movie zombie—one must take sensible precautions to avoid being bitten, but they are easily outwitted and, when troublesome, can be dispatched to oblivion without legal consequence.

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2012).

In effect, Section 3553(a) tells sentencing judges that they are to take into account all of the general factors and theories that are traditionally thought relevant to setting a punishment—just deserts, deterrence, crime control, rehabilitation, restitution, rough equality of outcomes among similarly situated offenders—in addition to the particular sentencing range prescribed by application of the Guidelines. Since the *Booker* line voided Section 3553(b), which gave the Guidelines strongly presumptive effect, and decreed that the Guidelines, which were designed to impose order and directionality on this mélange of concepts, may not be given any more weight than any other consideration, the result is that the factors listed in Section 3553(a) can now, quite plausibly, be enlisted to justify virtually any sentencing outcome.

25. Formally, the Supreme Court has equated review of a sentence for reasonableness with an abuse of discretion standard. *Rita*, 551 U.S. at 360–61 (Stevens, J., concurring). But given that, as noted above, *supra* note 23, appellate courts now reverse only eight out of the more than 80,000 sentences imposed annually for substantive unreasonableness; it is plain that a sentencing judge must now abuse his discretion to a degree approaching lunacy before appellate intervention is likely.

III. BOOKER AND THE SEVERITY REVOLUTION THAT WASN'T

Given the widespread and vocal unhappiness with the harshness of Guidelines sentencing rules, one would have expected the declaration that the Guidelines were really and truly advisory to be followed by an immediate and sustained decline in the severity of sentences imposed on federal defendants.²⁶ Yet, while there has certainly been some movement in that direction, careful examination of the underlying statistics reveals that it has been surprisingly limited.

Figure 1A: Mean (Average) Federal Sentence (Months):
2000–2012
[Not Counting Probation-Only Cases]

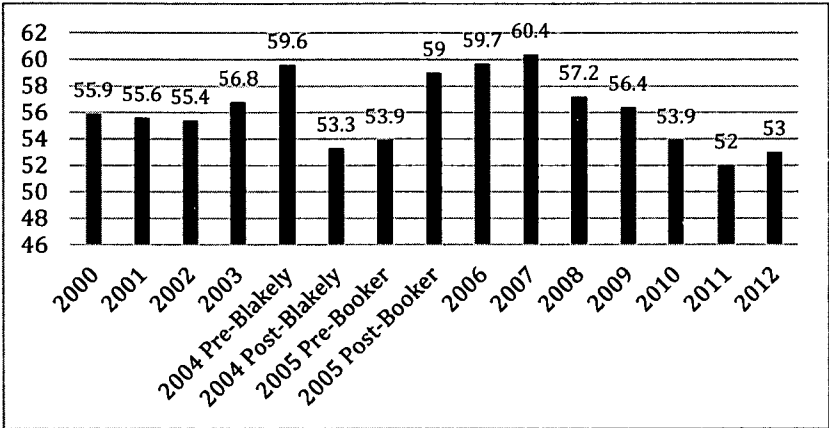
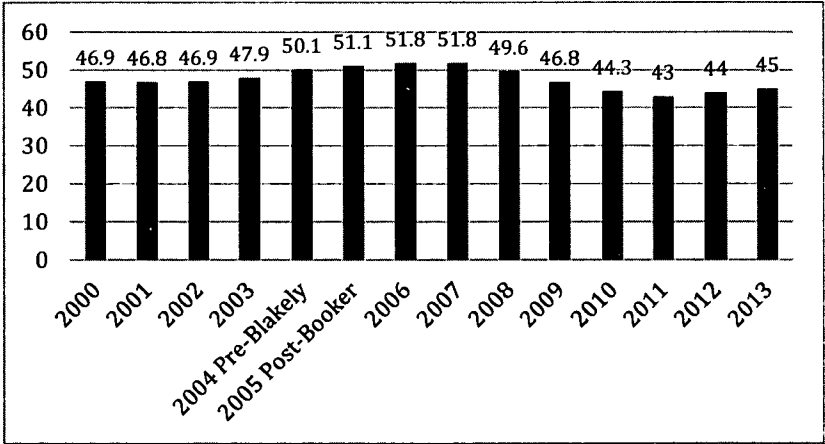
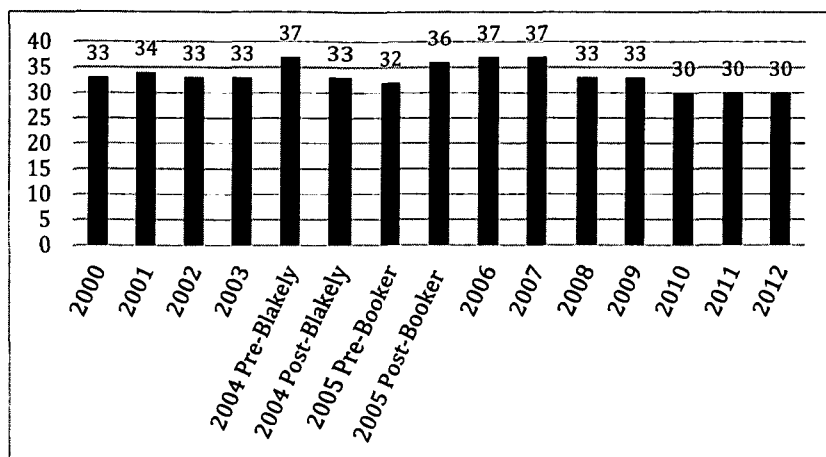


Figure 1B: Mean (Average) Sentence Length (Months):
2000–2013
[Counting Probation as Zero Months]



26. See Carl Hulse & Adam Liptak, *New Fight over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 (finding praise from those who hoped to see more lenient sentences and predictions that the *Booker* decision would allow federal judges to avoid harsh sentences).

**Figure 2: Median Federal Sentence (Months):
2000–2012
[Not Counting Probation-Only Cases]**



As Figures 1A,²⁷ 1B,²⁸ and 2²⁹ illustrate, both the mean (average) and median federal sentences are now lower than they were before the 2004–2005 period in which *Blakely* and *Booker* were decided. Interestingly, however, mean and median sentence lengths actually increased in 2006 and 2007, beginning their decline only after the December 2007 *Kimbrough* and *Gall* opinions in which the Court made clear that the Guidelines were really and truly advisory.³⁰ Moreover, while the mean sentence (whether calculated with or without probationary sentences) and the median sentence have dropped by a not inconsiderable seven months below their previous highs, the mean and median federal sentences are still only three to six months lower than they were in the early

27. The data in Figure 1A are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.14 (reporting mean and median length of imprisonment for federal defendants, excluding sentences of probation, home confinement, or other nonprison alternatives).

28. The data in Figure 1B are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (reporting mean and median length of sentence for federal defendants, counting sentences of probation as zero months). The data in Figure 1B are also derived from the U.S. Sentencing Commission's Preliminary Quarterly Data Report for the fourth quarter of 2013. U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT 4TH QUARTER RELEASE tbl.19 (2014) [hereinafter 4TH QTR. RELEASE], available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_4th.pdf.

29. The data in Figure 2 are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.14.

30. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); *Gall v. United States*, 552 U.S. 38, 46 (2007); *supra* Figures 1A, 1B, 2.

2000s, when the outcry against the Guidelines' asserted severity was at fever pitch.³¹ And, the decline in mean sentence length has now reversed, with a one-month upward tick in 2012 and another in 2013, while median sentences have remained flat for the last three years (2010–2012). Thus, the trend lines in Figures 1 and 2 already suggest a far more nuanced story than the standard tale in which the Guidelines placed morally outraged judges in an intolerable legal straightjacket, from which *Booker* released them to frolic freely in the sunshine of enlightened and merciful discretion—Glory Hallelujah!

On the one hand, both common sense and available statistics suggest that increased judicial sentencing discretion post-*Booker* has produced lower sentences in a large and growing number of cases. Figure 3³² illustrates the steady post-*Booker* increase in the percentage of cases sentenced outside the applicable guideline range. Given that the proportion of sentences above the applicable guideline range has never been greater than roughly 2%,³³ the steady rise in outside-the-range sentences equates to a steady increase in below-range sentences, which should be driving down average sentence length. Indeed, as Figures 4A³⁴ and 4B³⁵ show, there is an apparent inverse correlation between increased judicial sentencing discretion and sentence severity—the more judges diverge from the Guidelines, the lower the average sentence seems to fall.

31. See, e.g., Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 26–29 (2003) (finding widespread criticisms of the Federal Sentencing Guidelines across the legal community).

32. The data in Figure 3 are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26. The data in Figure 3 are also derived from the U.S. Sentencing Commission's Preliminary Quarterly Data Report for the fourth quarter of 2013. 4TH QTR. RELEASE, *supra* note 28, tbl.4.

33. 2012 SOURCEBOOK, *supra* note 23, fig.G; 4TH QTR. RELEASE, *supra* note 28, tbl.1.

34. The data in Figure 4A are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.14–16.

35. The data in Figure 4B are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.13, 26. The data in Figure 4B are also derived from the U.S. Sentencing Commission's Preliminary Quarterly Data Report for the fourth quarter of 2013. 4TH QTR. RELEASE, *supra* note 28, tbl.2, 19.

Figure 3: Sentences Imposed Outside Guideline Range

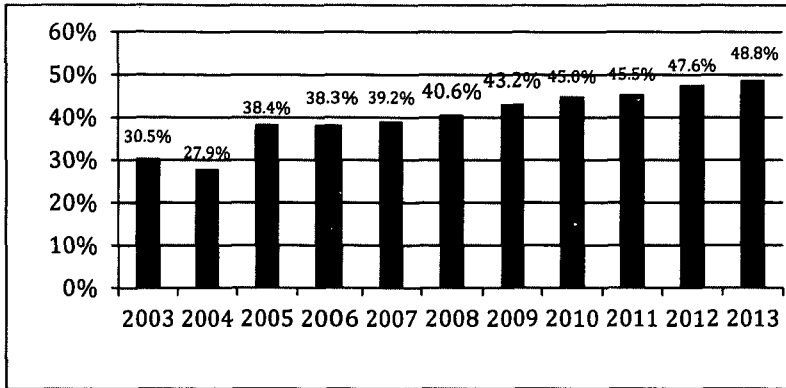


Figure 4A: Judicial Discretion vs. Sentence Severity (Months)
[Not Counting Probation-Only Cases]

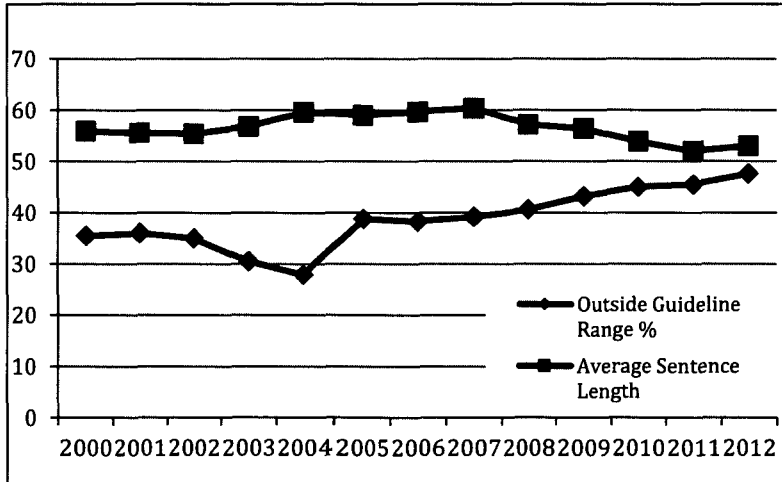
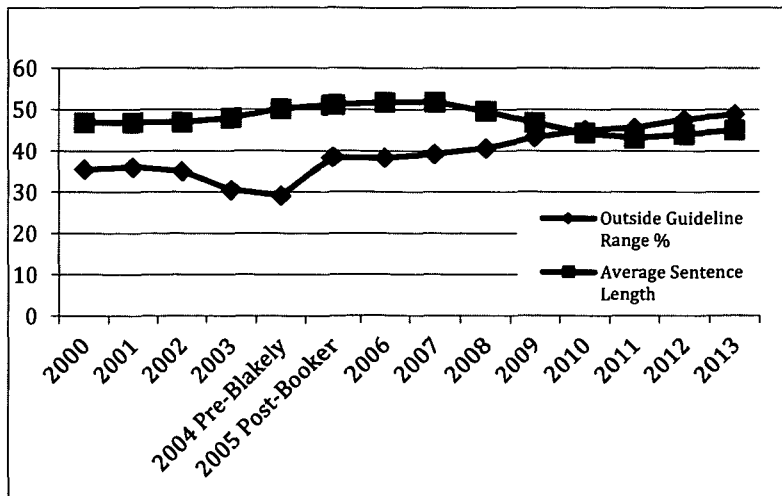
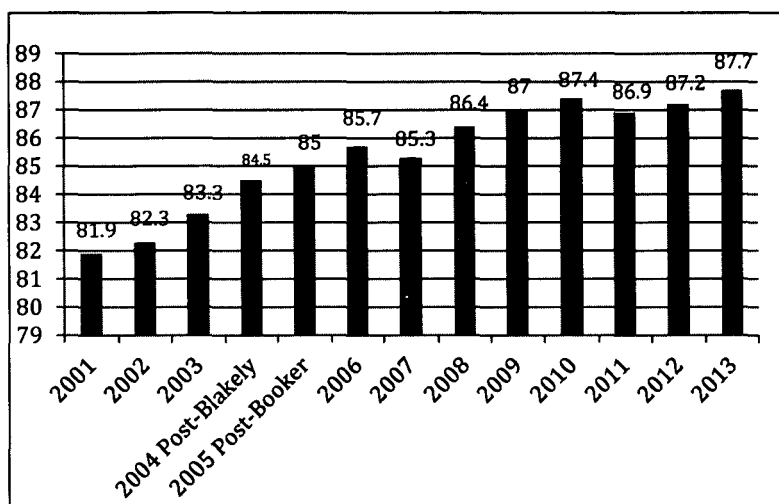


Figure 4B: Judicial Discretion vs. Sentence Severity (Months)
[Counting Probation-Only Cases as Zero Months]



On the other hand, if one looks below the surface of the gross averages, a more complex story immediately emerges. First, given that a common charge against the Guidelines' regime has been that it produces more prison terms and fewer sentences of probation or mixed sentences combining incarceration with other sanctions, one would have expected that *Booker's* manumission of federal judges would have generated an upwelling of probationary or mixed sentences. In fact, the reverse has been true. As Figure 5³⁶ shows, the proportion of prison-only sentences has been creeping steadily upward for over a decade, and neither *Booker* nor the *Gall/Kimbrough* duo seems to have affected this trend at all.

Figure 5: Percentage of Prison-Only Sentences



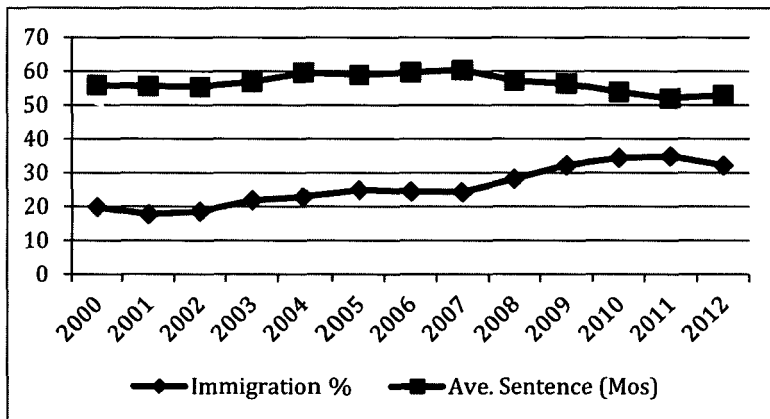
Second, the decline in the average federal sentence is plainly being driven to an important degree by changes in the mix of cases prosecuted in federal courts, as opposed to a general decrease in the sentences of similarly situated defendants. In particular, as Figure 6³⁷ illustrates, the movement of average federal sentences in the post-*Booker* period correlates inversely with the percentage of relatively low-sentence immigration cases in the overall population of federal defendants. Fiscal Year (FY) 2008 was the year in which *Kimbrough* and *Gall* took effect and fully liberated federal judges to vary from the Guidelines at

36. The data in Figure 5 are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.16 and the U.S. Sentencing Commission's Preliminary Quarterly Data Report for the fourth quarter of 2013.

37. The data in Figure 6 are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls.3, 14.

will.³⁸ But more importantly it saw the beginning of a huge upsurge in the number of immigration cases, which went from 17,592, or 24.2% of all federal cases, in 2007³⁹ to roughly 30,000, or 34.5% of all cases, in 2011.⁴⁰ Given that, in 2011, the average sentence for an immigration case was sixteen months—as compared to seventy months for drug trafficking, eighty-three months for firearms, and twenty-three months for fraud⁴¹—the downward pressure exerted by the rising tide of immigration cases on the federal average sentence was immense. And the data for FY 2012 provide a lovely, if brief, indication that the reverse may also be true. When the percentage of immigration cases fell from 34.5% in 2011 to 31.5% in 2012,⁴² the length of the average federal sentence dutifully ticked right back up from fifty-two to fifty-three months.⁴³

Figure 6: Relation of Average Federal Sentence to Percentage of Immigration Cases



Third, and most importantly, there exists direct evidence that, within offense types, defendants sentenced since *Booker* are not faring all that much differently than those sentenced before that supposed earthquake. To begin, it appears that changes in

38. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); *Gall v. United States*, 552 U.S. 38, 46 (2007).

39. U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.3 (2008) [hereinafter 2007 SOURCEBOOK], available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2007/sbtoc07.htm.

40. 2011 SOURCEBOOK, *supra* note 23, tbl.3.

41. *Id.* tbl.13.

42. 2012 SOURCEBOOK, *supra* note 23, tbl.3.

43. Compare 2011 SOURCEBOOK, *supra* note 23, tbl.14 (reporting the number of immigration cases and average sentence imposed), with 2012 SOURCEBOOK, *supra* note 23, tbl.14 (reporting a lower percentage of immigration cases and higher average sentences than in 2011).

average sentence length are quite specific to offense type. As Figures 7A⁴⁴ and 7B⁴⁵ show, since 2007, mean and median drug trafficking and immigration sentences have declined, but mean and median sentences for economic crimes and firearms offenses have increased.

Figure 7A: Average Sentence by Offense Type: 2000–2012 (Months)

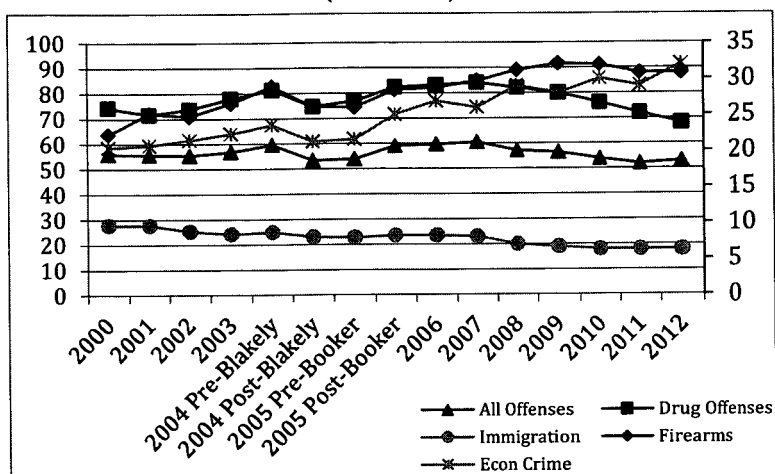
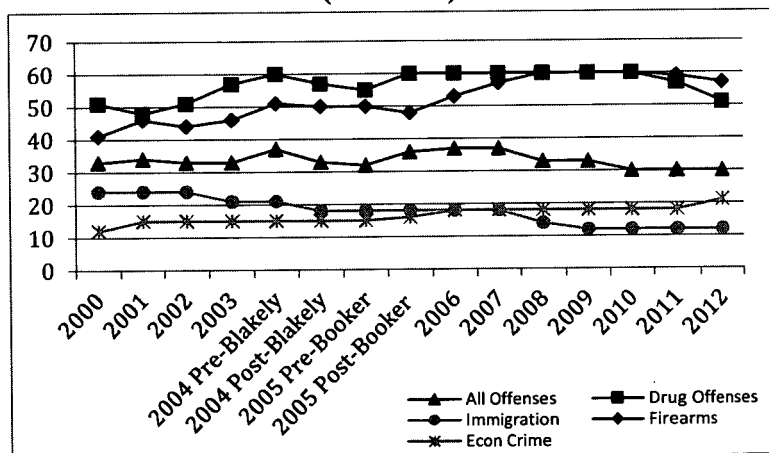


Figure 7B: Median Sentence by Offense Type: 2000–2012 (Months)

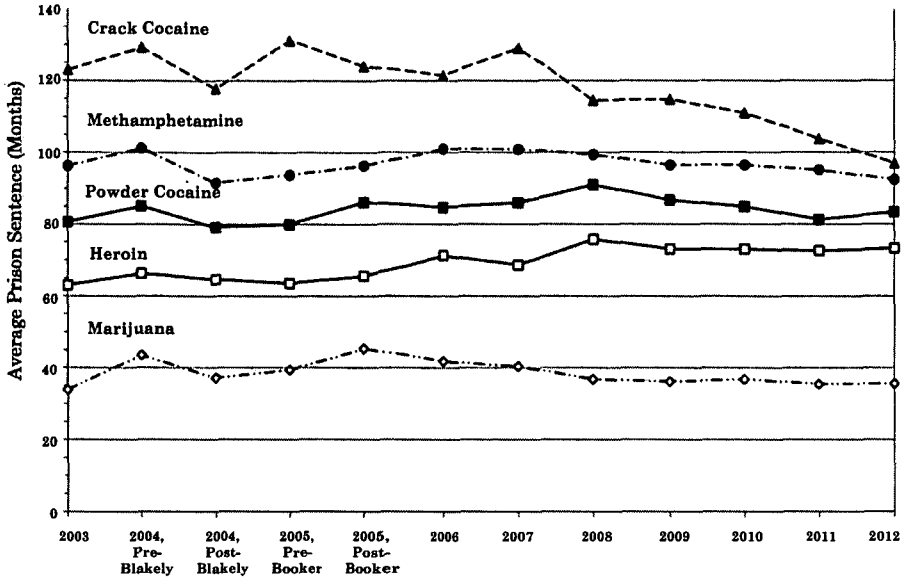


44. The data in Figure 7A labeled “All Offenses” and “Firearms” are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.14. The data labeled “Econ Crim,” “Immigration,” and “Drug Offenses” are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.E.

45. The data in Figure 7B labeled “All Offenses” and “Firearms” are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.14. The data labeled “Econ Crim,” “Immigration,” and “Drug Offenses” are derived from the 2000 through 2012 editions of U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.E.

The same heterogeneity is observable within general offense types. As shown in Figure 8, the severity trend lines for average drug sentences have varied markedly by drug type.

Figure 8: Length of Imprisonment in Each Drug Type,[†] Fiscal Years 2003–2012⁴⁶



[†] Only cases sentenced under USSG §§ 2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession) are depicted in this figure. Additionally, cases with zero months prison were excluded. Cases missing drug type or sentencing information were not included in this figure. Data in this figure represent information from the Commission's ongoing data files; therefore, data points may vary from prior sourcebooks.

Indeed, perhaps the most notable thing about drug sentences seven years post-*Booker* is how little they have changed. As indicated in Figure 9 below, a comparison of sentences in 2003, the last full year before the *Blakely-Booker* shake-up, with those in 2012 shows that the mean (average) sentences of powder cocaine, heroin, and marijuana offenders have actually increased in the last decade, as have the median sentences for heroin and marijuana. Mean sentences for crack cocaine and methamphetamine cases have declined, but the drop for methamphetamine has been only 4.3 months.⁴⁷ Median sentences for crack cocaine and methamphetamine fell, albeit by only three months for methamphetamine, but median powder cocaine sentences have held

46. Figure 8 is a reproduction of 2012 SOURCEBOOK, *supra* note 23, fig.L.

47. *Infra* Figure 9.

exactly flat at sixty months throughout the era of revived judicial sentencing discretion.⁴⁸ In short, the only class of drug offenses that has seen a significant and sustained decline in sentence length over the last decade has been crack cocaine. Not coincidentally, crack is the only drug type as to which both the applicable guidelines and the governing statute have been amended to reduce the prescribed sentences. The Sentencing Commission reduced guideline sentences for crack effective November 1, 2007,⁴⁹ and subsequently made those reductions retroactive for offenses occurring before that date.⁵⁰ In 2010, Congress passed the Fair Sentencing Act, which raised the quantities of crack triggering five- and ten-year mandatory sentences,⁵¹ thus reducing average sentences further. As illustrated in Figure 8, the progression of the thirty-month drop in average crack sentence since 2007 corresponds exactly to the actions of the Commission and Congress. The average cocaine sentence was near its all-time peak level in 2007, but dropped precipitously in 2008, then leveled off, and then began a renewed decline beginning in 2010.⁵²

Figure 9⁵³

Drug Type	2003 Mean	2012 Mean	2003	2012
	(Average)	(Average)	Median	Median
	Sentence	Sentence	Sentence	Sentence
	(Months)	(Months)	(Months)	(Months)
Powder Cocaine	80.6	83	60	60
Crack Cocaine	123	97	100	78
Heroin	63	73	46	60
Marijuana	33.9	36	21	24
Methamphetamine	96.3	92	75	72

The stasis in sentence length for drugs other than crack, and the rise in average sentence for heroin and marijuana, could

48. *Infra* Figure 9.

49. U.S. SENTENCING GUIDELINES MANUAL app.C, amends. 705, 706, 711 (2013).

50. See *United States v. Brewer*, 520 F.3d 367, 373 (4th Cir. 2008) (giving effect to the Sentencing Commission’s decision to make retroactive the reduction in sentences for crack offenses).

51. Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. § 841(b)(1) (2012)).

52. *Supra* Figure 8.

53. The data in Figure 9 are taken from U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.J (2004) [hereinafter 2003 SOURCEBOOK], available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2003/ar03toc.htm; 2012 SOURCEBOOK, *supra* note 23, at fig.J.

conceivably be the result of government behavior, which has offset increasing discretionary lenity by judges. For example, post-*Booker* prosecutors might be bringing cases with ever-rising drug quantities, or insisting on pleas to ever-larger amounts, to offset ever-increasing judicial leniency. But the data will not support that hypothesis. Because the offense level in drug cases is driven almost exclusively by the type and quantity of drug, a significant change in prosecutorial charging or plea bargaining practice on quantity should be reflected in the average guideline range for drug cases generally, and more particularly in the average guideline range within cases involving a particular drug type. As Figure 10 indicates, the average guideline minimum for drug cases has fluctuated slightly from quarter to quarter over the last five years, but the overall trend line is flat to slightly down. The same is true within drug type. From FY 2008 through FY 2012, the average guideline minimum for methamphetamine, heroin, and marijuana cases has remained almost exactly flat,⁵⁴ meaning that the average drug quantity per case within each drug type has stayed uncannily constant.⁵⁵

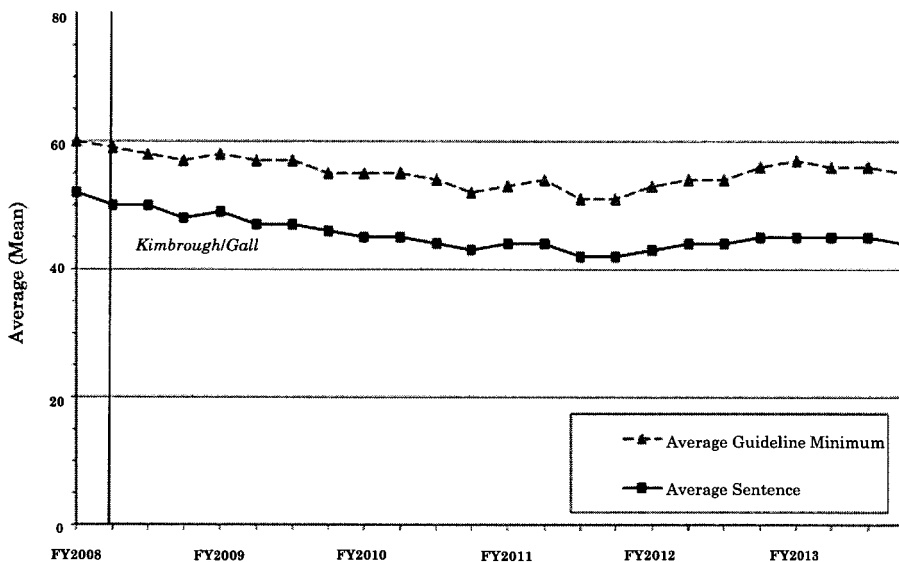
That being said, the statistical relationship that best illustrates the tenacity of the Guidelines as determinants of actual sentences—both as to federal defendants generally and as to defendants in particular offense types—is the difference between the average

54. U.S. SENTENCING COMM'N, QUICK FACTS: METHAMPHETAMINE TRAFFICKING OFFENSES (2013), available at http://www.ussc.gov/Quick_Facts/Quick_Facts_Methamphetamine.pdf (noting that the average guideline minimum for methamphetamine traffickers remained “consistently between 121 and 122 months” from 2008–2012, and that the average sentence imposed “decreased from 98 to 92 months”); U.S. SENTENCING COMM'N, QUICK FACTS: HEROIN TRAFFICKING OFFENSES (2012), available at http://www.ussc.gov/Quick_Facts/Quick_Facts_Heroin_Trafficking.pdf (noting that the average guideline minimum for heroin traffickers remained stable at approximately 90 months from 2008–2012, and that the average sentence imposed “averaged around 69 months during that period”); U.S. SENTENCING COMM'N, QUICK FACTS: MARIJUANA TRAFFICKING OFFENSES (2012), available at http://www.ussc.gov/Quick_Facts/Quick_Facts_Marijuana_Trafficking.pdf (noting that the average guideline minimum for marijuana traffickers was “consistently between 40 and 43 months” from 2008–2012, and that the average sentence imposed “was consistently between 33 and 35 months”).

55. One disconcerting implication of this reality, at least for those who support vigorous criminal law responses to drug trafficking, is that federal antidrug efforts seem to be having virtually zero effect on the supply side of illegal drug markets. Despite the incarceration of roughly 25,000 new defendants each year in the federal system alone, the same number of people moving the same quantities of the same drugs are caught by federal agents year after year. Compare 2012 SOURCEBOOK, *supra* note 23, tbl.33 (showing 25,367 persons sentenced for federal drug offenses in FY 2012), with 2003 SOURCEBOOK, *supra* note 53, tbl.33 (showing 26,023 persons sentenced for federal drug offenses in FY 2003). Of course, it may be that, absent federal efforts, there would be more people trafficking in more drugs, but even if so, it appears that the effectiveness of federal drug enforcement has reached something close to its irreducible practical limits.

guideline minimum and the average sentence imposed.⁵⁶ The guideline minimum/actual sentence differential shows how far the sentencing results produced by the interactions of judges, prosecutors, defense attorneys, and other system actors deviate from the norm prescribed by the Guidelines.⁵⁷ Figures 10–14 below chart the guideline minimum/actual sentence differential, quarter by quarter, from the *Gall* and *Kimbrough* decisions in December 2007 through 2013 for all cases (Figure 10), and for the major subcategories of federal offense: drugs (Figure 11), firearms (Figure 12), alien smuggling (Figure 13), and economic crime cases (Figure 14).⁵⁸

Figure 10: Average Sentence Length and Average Guideline Minimum Quarterly Data for All Cases† in Months for Fiscal Years 2008–2013⁵⁹



† Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

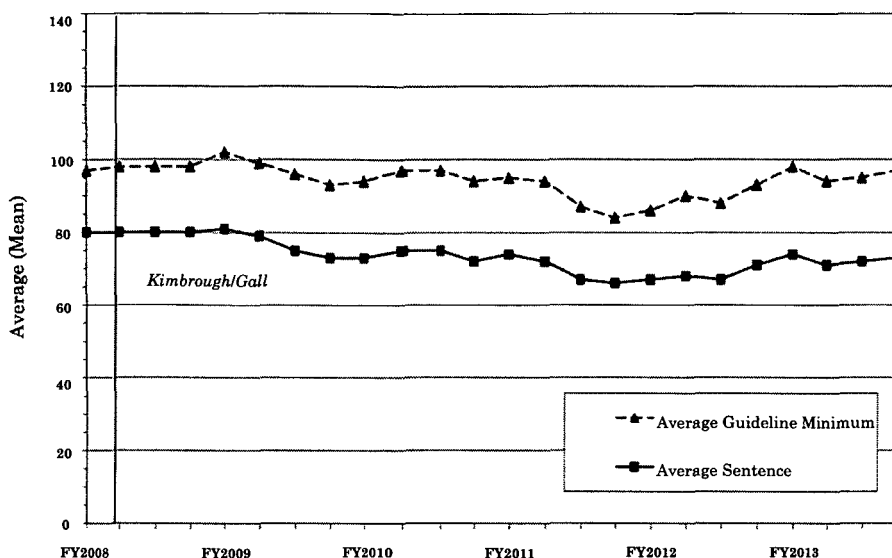
56. See *infra* notes 57–67 and accompanying text (comparing the average guideline minimum and the average sentence imposed within select offenses as well as all offenses).

57. See *infra* Figures 10–14 (depicting the spread between the average guideline minimum sentences and the average sentences actually imposed by federal courts).

58. *Kimbrough v. United States*, 552 U.S. 85, 85 (2007); *Gall v. United States*, 552 U.S. 38, 38 (2007); *infra* Figures 10–14.

59. Figure 10 is a reproduction of 4TH QTR. RELEASE, *supra* note 28, fig.C. This Figure utilizes data from fiscal years 2008 through 2012 and fourth quarter preliminary cumulative data (October 1, 2012, through September 30, 2013).

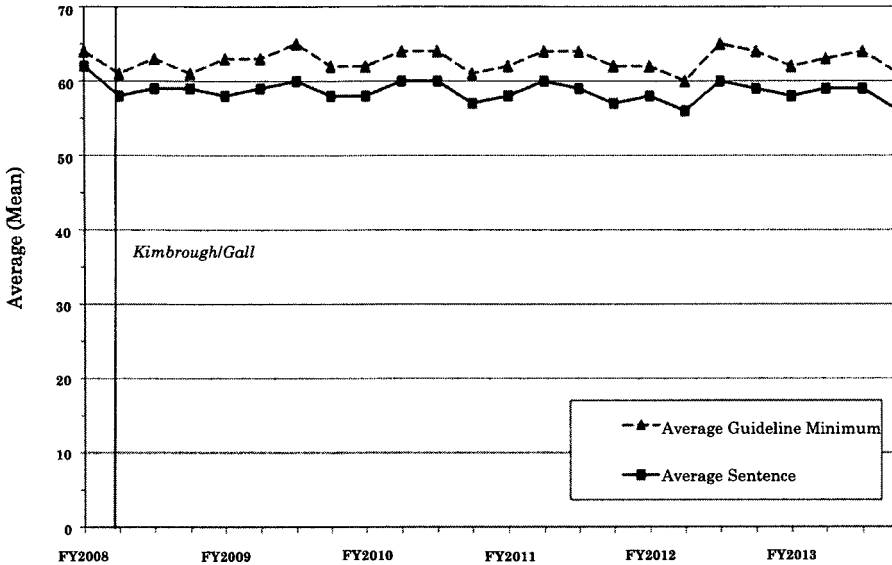
Figure 11: Average Sentence Length and Average Guideline Minimum Quarterly Data for § 2D1.1 Offenders (Unlawful Drug Trafficking or Manufacturing)[†] in Months for Fiscal Years 2008–2013⁶⁰



[†] Figure includes only cases with a primary sentencing guideline of USSG § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

60. Figure 11 is a reproduction of 4TH QTR. RELEASE, *supra* note 28, fig.H. This Figure utilizes data from fiscal years 2008 through 2012 and fourth quarter preliminary cumulative data (October 1, 2012, through September 30, 2013).

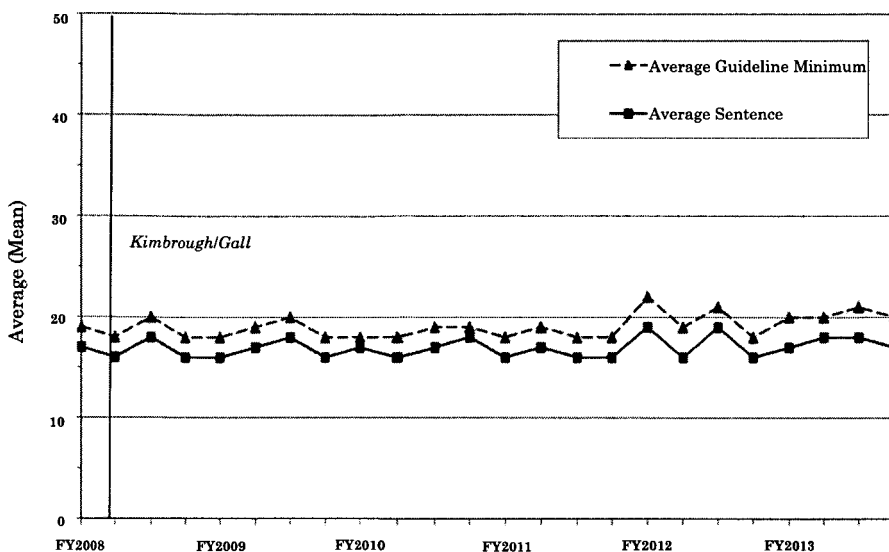
Figure 12: Average Sentence Length and Average Guideline Minimum Quarterly Data for § 2K2.1 Offenders (Unlawful Possession of or Transaction in Firearms)[†] in Months for Fiscal Years 2008–2013⁶¹



[†] Figure includes only cases with a primary sentencing guideline of USSG § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms and Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

61. Figure 12 is a reproduction of 4TH QTR. RELEASE, *supra* note 28, fig.E. This Figure utilizes data from fiscal years 2008 through 2012 and fourth quarter preliminary cumulative data (October 1, 2012, through September 30, 2013).

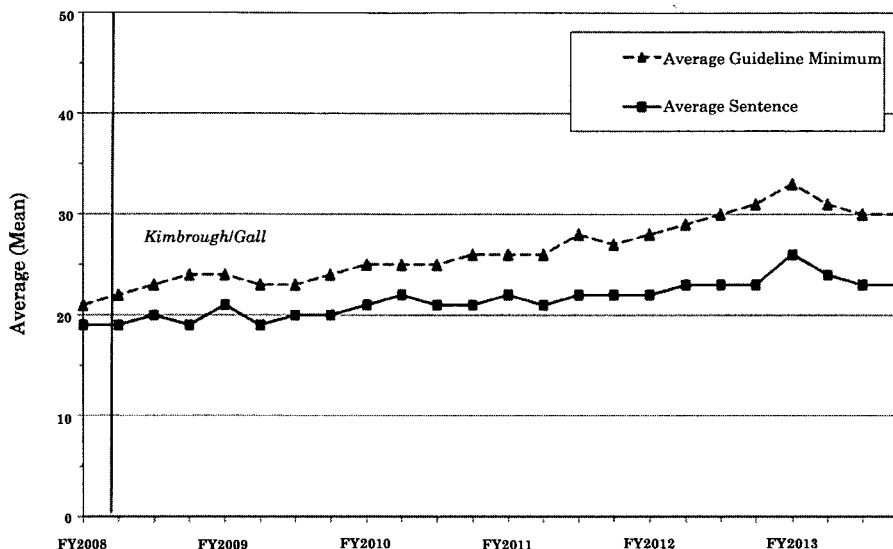
Figure 13: Average Sentence Length and Average Guideline Minimum Quarterly Data for § 2L1.1 Offenders (Alien Smuggling)[†] in Months for Fiscal Years 2008–2013⁶²



[†] Figure includes only cases with a primary sentencing guideline of USSG § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

62. Figure 13 is a reproduction of 4TH QTR. RELEASE, *supra* note 28, fig.F. This Figure utilizes data from fiscal years 2008 through 2012 and fourth quarter preliminary cumulative data (October 1, 2012, through September 30, 2013).

Figure 14: Average Sentence Length and Average Guideline Minimum Quarterly Data for § 2B1.1 Offenders (Theft, Property Destruction, and Fraud)[†] in Months for Fiscal Year 2008–2013⁶³



[†] Figure includes only cases with a primary sentencing guideline of USSG § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligation of the United States). Additionally, cases with an amendment year prior to 2001 were excluded from this figure because prior to this time fraud cases were reported as USSG § 2F1.1. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

Given that judges now operate in an advisory regime, which gives them nearly unbounded discretion to embrace or reject guideline sentences, these charts suggest several conclusions. The most fundamental is that the judiciary has decidedly not enlisted in a broad-gauge revolt against the severity levels prescribed by the Sentencing Guidelines. Figure 10 shows two things. First, the actual average sentence for all cases is always lower than the average guideline minimum, which is wholly unsurprising because throughout the Guidelines era the majority

63. Figure 14 is a reproduction of 4TH QTR. RELEASE, *supra* note 28, fig.D. This Figure utilizes data from fiscal years 2008 through 2012 and fourth quarter preliminary cumulative data (October 1, 2012, through September 30, 2013).

of sentences imposed within the range have been at the lower end of that range⁶⁴ and some significant proportion of all defendants (ranging from about one-quarter in the early years⁶⁵ to nearly half in 2012⁶⁶) have always been sentenced below the applicable range. Second, from 2008–2013, the two measurements moved in nearly perfect tandem, with only a very slight broadening of the guideline minimum/actual sentence differential in this period. Figure 11 reveals the same pattern for drug cases, including the same very modest increase in guideline minimum/actual sentence differential. Figures 12 and 13 show the guideline minimums and actual sentences in firearm and immigration cases moving in almost-perfect lockstep, with less of a differential and no increase in differential over time. What is so striking about these figures is that, for three of the four most common case types in federal court, the system seems to be in rough equilibrium, comfortable with imposing sentences at a modest and fairly standard discount from the sentences called for by the Guidelines and producing average sentences only fractionally lower than those imposed before *Booker*.⁶⁷

The only anomalous case type is economic crime (Figure 14), in which the average guideline minimum has increased steadily, from under twenty months to over thirty months, while the average sentence imposed has risen only slightly, from about nineteen months in FY 2008 to about twenty-three months in 2013. Simultaneously, the guideline minimum/actual sentence differential for economic crime has roughly quadrupled, from perhaps two months to roughly eight. These figures—and the Sentencing Commission’s reaction to them—hold several possible lessons, one encouraging, another less so.

The encouraging lesson stems from the fact that the Commission is acutely aware of the degree of divergence between actual sentences and guideline prescriptions in the economic

64. See, e.g., U.S. SENTENCING COMM’N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.H (1998) (showing that a majority of defendants in every major crime category sentenced within the guideline range were sentenced either to the guideline minimum or within the bottom half of the range); 2012 SOURCEBOOK, *supra* note 23, fig.H (showing that a majority of defendants in every major crime category sentenced within the guideline range were sentenced either to the guideline minimum or within the bottom half of the range).

65. See, e.g., U.S. SENTENCING COMM’N, 1993 ANNUAL REPORT 156 (1994) (reporting that in FY 1993, 23.5% of all sentences were downward departures).

66. 2012 SOURCEBOOK, *supra* note 23, tbl.N (reporting that 45.6% of all sentences were imposed below the guideline range).

67. *Id.* at fig.A; see also *supra* Figures 1A, 1B, 2 (depicting only a modest decline in average and median sentences imposed after *Booker*); *supra* Figures 11–13 (reflecting courts’ consistent imposition of sentences at a set discount of the average guideline minimums since *Booker*).

crime area. In September 2013, the Commission held a symposium in New York to consider the principle complaints about the primary economic crime guideline, § 2B1.1,⁶⁸ and it is actively studying revisions to that Guideline.⁶⁹ If the Commission is successful in crafting and passing amendments that address the *valid* complaints about economic crime sentencing to the satisfaction of the primary stakeholders in the federal sentencing system, that will represent a signature success for one of the often-heard arguments in favor of the post-*Booker* advisory system, namely that allowing judges greater latitude to diverge from the guideline range generates valuable feedback in response to which beneficial changes to the Guidelines can be made.⁷⁰

The more troubling part of the economic crime story is that some aspects of the judiciary's revolt against these guidelines may be ill-considered. As I have detailed elsewhere, § 2B1.1 has been repeatedly amended throughout the Guidelines period to increase the prescribed sentences for a broad swath of economic crime offenders.⁷¹ This process accelerated markedly when the Sentencing Commission's Economic Crime Package of 2001, which designedly raised sentences for mid-to-high level white collar offenders, was followed by a series of additional increases compelled by congressional directives in the Sarbanes-Oxley Act of 2002.⁷² The result was a sentencing structure that prescribes unprecedented multi-decade sentences for the relatively few defendants convicted of crimes that caused losses in the tens or hundreds of millions of dollars—sentences longer than those customarily imposed on bank robbers and even murderers.⁷³ Indeed, in these very big cases, Guidelines calculations routinely produce offense levels that significantly exceed forty-three, and are therefore, quite literally, off the top of the Guidelines chart, on which an offense level of forty-three equals life

68. See U.S. SENTENCING COMM'N, SYMPOSIUM OF ECONOMIC CRIME (2013), available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Transcript-of-Symposium-on-Economic-Crime.pdf.

69. Notice of Final Priorities, 78 Fed. Reg. 51,820 (Aug. 21, 2013).

70. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 321–23 (2006).

71. Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 426–30 (2004).

72. *Id.*

73. *United States v. Ebberts*, 458 F.3d 110, 129 (2d Cir. 2006); Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT'G REP. 167, 168–69 (2008).

imprisonment.⁷⁴ It is thus hardly remarkable that judges would balk at literal application of obviously ill-considered rules for these extraordinary cases.⁷⁵ However, the post-Sarbanes-Oxley structure also raised sentences for those outside of the financial criminal elite, but by not nearly so much. For example, in 2012, the average guideline minimum for a defendant whose crime caused a loss of between \$400,000 and \$1 million was forty-one months, and for losses of \$1 million to \$2.5 million, it was fifty-three months, or not quite four-and-one-half years.⁷⁶ Yet it appears that judges are routinely declining to impose Guidelines sentences even at these far lower levels.⁷⁷ In that regard, consider Figures 15 through 17 below.

Figure 15 shows that 83% of cases sentenced under the fraud guideline involve losses of less than \$1 million, and about 91% involve losses of less than \$2.5 million. Figure 16 shows the difference between the minimum guideline sentence and the average imposed sentence for each guideline loss amount category. Figure 17 shows, for each guideline loss category, the proportion of sentences imposed within the range, above the range, below the range because the government recommended that result, or below the range because a judge lowered the sentence absent a government recommendation. Taken together, these charts tell a remarkable story. In sum, beginning at the low end with cases in which at least \$70,000 was stolen and the average guideline minimum was only twenty-one months, and running up to cases in which the loss ranged from \$1 million to \$2.5 million and the average guideline minimum was fifty-three months, judges imposed below-range sentences at least 60% of the time.⁷⁸ And in one-quarter to one-third of these cases, judges did so on their own initiative and despite the absence of any government suggestion that leniency was warranted.⁷⁹ Even in cases where the defendant stole more than \$1 million and the

74. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A; Bowman, *supra* note 73, at 168; *Allen Stanford Sentenced to 110 Years in Prison for Orchestrating \$7 Billion Investment Fraud Scheme*, U.S. DEPT. OF JUSTICE (Jun. 14, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-756.html>.

75. Bowman, *supra* note 73, at 169–70 (providing numerous examples of cases where judges have granted downward variances below the applicable Guideline range).

76. U.S. SENTENCING COMM’N, 2013 SYMPOSIUM ON ECONOMIC CRIME, SENTENCING AND GUIDELINE APPLICATION INFORMATION FOR §2B1.1 OFFENDERS 7 fig.7 (2013) [hereinafter 2013 SYMPOSIUM ON ECONOMIC CRIME], available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Sentencing_Guideline_Application_Info.pdf.

77. See *id.* (illustrating the average sentences imposed on § 2B1.1 offenders are uniformly below the average Guidelines minimum sentence).

78. *Id.* fig.8.

79. *Id.*

average guideline minimum was only fifty-three months, judges were willing to impose a guideline sentence in only 34.7% of the cases.⁸⁰

Figure 15: Number of § 2B1.1 Offenders in Each Loss Table Category
Fiscal Year 2012 (N = 8,507)⁸¹

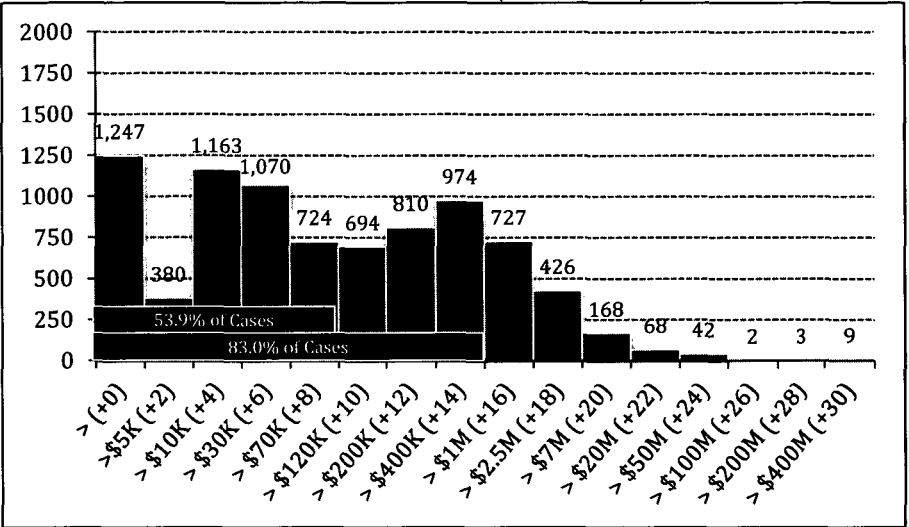
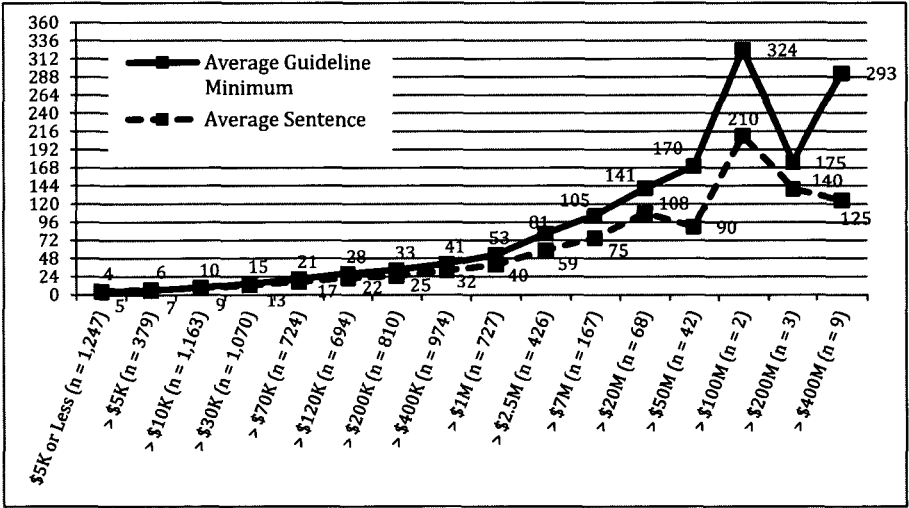
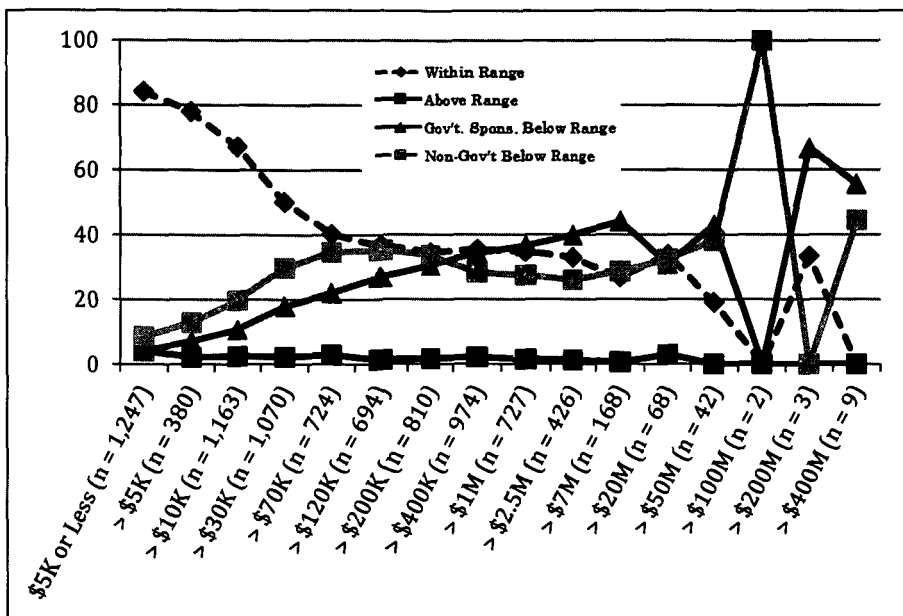


Figure 16: Offenders' Average Sentence Length and Average Guideline Minimum for Each § 2B1.1 Loss Table Category in Months for Fiscal Year 2012⁸²



80. *Id.*
81. *Id.* fig.6.
82. *Id.* fig.7.

Figure 17: Sentence Relative to the Guideline Range for § 2B1.1 Offenders in Each Loss Table Category in Months for Fiscal Year 2012⁸³



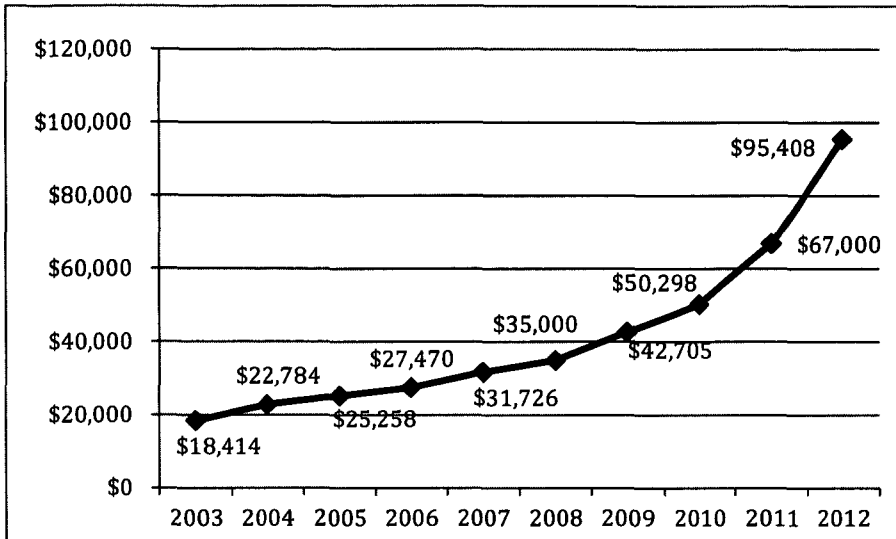
The judges' increasing resistance to imposing Guidelines sentences in fraud cases is even more striking when one considers Figure 18, which shows that the seriousness of cases filed by federal prosecutors, at least as measured by loss amount, has more than quadrupled since 2003, from \$18,414 to \$95,408.⁸⁴ And in the post-*Booker* period from 2006 to 2012, the average loss in cases sentenced under § 2B1.1 more than tripled, but the mean (average) sentence imposed for fraud cases increased by less than six months, while the median sentence increased by only two months.⁸⁵

83. *Id.* fig.8.

84. *Id.* at 2.

85. Compare U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2007) (reporting the mean fraud sentence in 2006 as 18.6 months, and the median fraud as ten months), with 2012 SOURCEBOOK, *supra* note 23, tbl.13 (reporting the mean fraud sentence in 2012 as twenty-four months, and the median fraud as twelve months).

**Figure 18: Median Loss Amount for § 2B1.1 Offenders
Fiscal Years 2003–2012⁸⁶**



This is not to suggest that the Guidelines' current sentence prescriptions for fraud cases of the middling to moderately serious variety are set at some Golden Mean from which widespread downward deviation would be irrational. But it is equally difficult to characterize current Guidelines sentences for this broad middle class of cases as irrationally draconian.⁸⁷ As Figure 16 reveals, the Guidelines now prescribe an average minimum sentence of about two years and nine months for someone who steals more than \$200,000 and about four years and five months for someone who steals between \$1 million and \$2.5 million. In any particular case these numbers may be too high or too low, but it seems nearly impossible to deny that, as benchmark averages, they are squarely within the range that a rational administrative agency charged with making national sentencing policy might choose. Yet, as Figure 17 shows, judges are now adhering to these benchmarks only about a third of the time, and, as Figure 14 indicates, their disinclination to conform to the fraud guidelines is growing by the year.

What makes this trend troubling is its uniqueness among major offense types. As demonstrated above, even after *Booker*, judges considering drug, firearm, and immigration cases have, on average, continued to adhere to the Guidelines to a striking degree.⁸⁸ This begs the question of why economic crime should be

86. 2013 SYMPOSIUM ON ECONOMIC CRIME, *supra* note 76, at 2 fig.2.

87. *Id.*

88. See *supra* Figures 7A, 7B (showing the mean and median sentences for the

different. It is difficult to avoid the suspicion that what we are witnessing is a slow resurgence of the “just like me” class bias in fraud cases—the reluctance of judges to impose serious punishment on people who look like themselves, who come from middle class backgrounds, who are educated and work in professional settings, and who steal with briefcases (now computers) rather than guns.⁸⁹

One of the objectives of the Federal Sentencing Guidelines when first enacted was to reject the then-existing sentencing consensus among federal judges that white collar crime should be punished primarily with probation or, at most, with extremely short periods of confinement.⁹⁰ One can fairly argue that the current Guidelines have gone too far in the other direction.⁹¹ But there is also a real danger that in the course of trying to fix the undoubted absurdities embedded in the rules governing the most serious cases, the Commission will so far relax the rules for serious offenders of the middling sort that the result will be acquiescence in the perennial tendency of judges to give undue leniency to criminals of their own class. “Feedback” is a fine thing. And feedback from experienced judges is very useful indeed. But in the end, there is nothing magical about the opinions of judges. The Commission does not exist merely to reify judicial preferences in rule form. Rather, it exists to craft rules that take account of the personal, professional, political, and moral judgments of all those—including the society at large—who have a stake in criminal justice.

major offense types); *supra* note 67 and accompanying text (describing that sentences imposed for drug, firearm, and immigration cases generally follow the Federal Sentencing Guidelines, even after *Booker*).

89. Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CIN. L. REV. 135, 140–42 (1991) (reviewing STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988)).

90. Frank O. Bowman, III, *Coping With “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 484 (1998) (discussing the Sentencing Commission’s early choice to raise white collar sentences); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 n.49 (1988) (“A pre-Guidelines sentence imposed on [white collar] criminals would likely take the form of straight probationary sentences.”).

91. See, e.g., James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT’G REP. 138, 138–40 (2010) (advocating that the current Federal Sentencing Guidelines are too harsh for high-loss economic crimes); Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 41 (2011) (“Some contend that white-collar sentencing has become unduly harsh, while others believe that the punishment is not nearly tough enough.”).

IV. A CAVEAT ON THE EFFECT OF MANDATORY MINIMUM SENTENCES

The statistics discussed so far apparently describe a federal sentencing system in which the post-*Booker* advisory Guidelines continue to dominate the process by which sentences are decided and remain remarkably sticky in determining the severity of the sentences actually imposed. However, the Guidelines themselves may not be the whole story. It may be that statutory mandatory minimum sentences are propping up the absolute level of sentences, and inflating the degree to which judges voluntarily adhere to the now-advisory Guidelines.⁹² The first point is obvious: if a defendant is subject to a mandatory minimum sentence, the judge must impose it, regardless of whether he or she would prefer a lower one.⁹³ Given that more than a quarter of all federal defendants are subject to a mandatory minimum sentence,⁹⁴ this constraint on judicial discretion may be having a significant statistical effect.

The second point is perhaps a bit less obvious. It arises from the fact that the sentence a judge is obliged to impose due to the presence of a statutory minimum sentence will often look like a sentence imposed in reliance on the advisory guideline.⁹⁵ This will be especially true in drug cases because mandatory minimum sentences and the base offense level under the Guidelines are both determined by drug quantity and the original Commission set the drug guidelines offense levels to correspond with the sentence lengths required by the mandatory minimum sentencing statutes.⁹⁶ Thus, if a quantity X of drug Y triggers a mandatory minimum sentence of sixty months, the guidelines for drug Y are generally structured so that proof of quantity X produces a guideline sentencing range of at least sixty months.⁹⁷ In such a case, the judge is bound to impose a sentence

92. Crystal S. Yang, *Have Inter-Judge Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348140.

93. *Id.*

94. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 120 (2012) (reporting that in FY 2010, "27.2 percent of all cases (19,896 of 73,239 cases) involved a conviction of an offense carrying a mandatory minimum penalty").

95. Yang, *supra* note 92.

96. Bowman, *Debate*, *supra* note 5, at 377, 419, 430 n.316; see *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENTENCING COMM'N (Aug. 1991), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm.

97. Bowman, *Debate*, *supra* note 5, at 377, 419, 430 n.316.

of at least sixty months, regardless of his or her views of the “reasonableness” of such a sentence, because *Booker* made the Guidelines advisory but did not void mandatory minimum statutes.⁹⁸ Therefore, post-*Booker* there are doubtless a number of cases each year in which the judge imposes the sentence required by a mandatory minimum sentencing statute, a sentence that is within the applicable guideline range and which therefore shows up on statistics as a within-range sentence, but in which, absent the mandatory minimum, the judge would have imposed a lower, non-Guidelines sentence.

The constraint imposed by mandatory minimums may soon be relaxed, at least somewhat. On August 12, 2013, Attorney General Eric Holder issued a memorandum changing Department of Justice charging policy with respect to mandatory minimum sentences.⁹⁹ The memorandum combines a moderation of the Justice Department’s views on the desirability of mandatory minimum sentences in drug cases with a procedural artifact of the Supreme Court’s recent decision in *Alleyne v. United States*¹⁰⁰ to produce a new regime in which line prosecutors are expressly empowered to eliminate mandatory minimum sentences in a potentially significant number of drug cases.¹⁰¹

Alleyne held that facts such as drug quantity that trigger a mandatory minimum sentence must now be treated as elements of the crime which must be pled in the indictment and proven beyond a reasonable doubt.¹⁰² Before *Alleyne*, if the facts disclosed at sentencing established a drug quantity sufficient to trigger a mandatory minimum, the judge could (and indeed was obliged to) find that quantity and apply it to the mandatory minimum sentence, regardless of what was pled in the indictment or advocated by the prosecutor.¹⁰³ After *Alleyne*, unless the prosecutor alleges the trigger quantity in the indictment and later proves it at trial or secures an admission to

98. Bowman, *supra* note 70, at 304; Yang, *supra* note 92 (noting that “a mandatory minimum that exceeds the Guidelines recommended minimum trumps the Guidelines”).

99. Memorandum from Eric Holder, Att’y Gen., to United States Attorneys and Assistant Attorney General for the Criminal Division, Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 1–3 (Aug. 12, 2013), <http://www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [hereinafter Holder Memo].

100. *Alleyne v. United States*, 133 S. Ct. 2151 (2013); Holder Memo, *supra* note 99, at 1–3.

101. Holder Memo, *supra* note 99, at 1–3.

102. *Alleyne*, 133 S. Ct. at 2162–63.

103. *Id.* at 2157.

it by the defendant as part of a plea, the mandatory minimum cannot be applied. Because a prosecutor can elect not to plead or prove the trigger amount, even in a case where the facts plainly support it, the effect of *Alleyne* is to place the application of mandatory minimum sentences even more completely within the discretionary power of prosecutors.

Some would argue that prosecutors already controlled the application of mandatory minimums before *Alleyne*, since they could, and sometimes did, agree not to produce evidence in support of triggering quantities of drugs. However, prior to the Obama Administration, Justice Department policy declared that prosecutors were obliged in all but the most unusual case to charge and accept a plea to nothing less than the “most serious, readily provable offense.”¹⁰⁴ And prior to *Alleyne*, the judge was obliged to find the facts regarding mandatory minimums based on the evidence before him regardless of the contents of the pleadings.¹⁰⁵ Now prosecutors can prevent application of a mandatory minimum simply by omitting an allegation of drug quantity from the indictment.¹⁰⁶ This new procedural wrinkle has somewhat less practical reach than first appears because federal mandatory minimum sentence statutes in the drug area almost universally tie proof of a triggering drug amount to an increase in both the minimum *and maximum* available sentence.¹⁰⁷ Under the rule of *Blakely v. Washington*, any fact raising the statutory maximum sentence must be pled and proven to a jury or admitted by the defendant.¹⁰⁸ Thus, even before *Alleyne*, prosecutors who wanted a quantity-based drug minimum to apply were obliged to plead and prove the trigger amount because proof of that amount would also raise the statutory maximum.¹⁰⁹ Accordingly, the real news in the Holder

104. See Memorandum from John Ashcroft, Att’y Gen., to All Federal Prosecutors (Sept. 22, 2003), http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

105. See *Alleyne*, 133 S. Ct. at 2157–58 (describing the pre-*Alleyne* view that “judicial factfinding that increased the mandatory minimum did not implicate the Sixth Amendment”).

106. Holder Memo, *supra* note 99, at 2.

107. Bowman, *Debate*, *supra* note 5, at 430 n.316; see also U.S. SENTENCING COMM’N, DRUG PRIMER 1–2 (2013), http://www.ussc.gov/Legal/Primers/Primer_Drug.pdf (stating that the “minimum and maximum statutory penalties [for drug offenses] are driven by the type and the quantity of the drug involved”).

108. *Blakely v. Washington*, 542 U.S. 296, 301, 303–04, 313 (2004).

109. See, e.g., *United States v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir. 2000) (overruling Circuit precedent that drug quantity was a sentencing factor that could be found using a preponderance of the evidence standard); *United States v. Sheppard*, 219 F.3d 766, 767–69 (8th Cir. 2000) (“Based upon the Supreme Court’s recent decision in *Apprendi v. New Jersey* . . . we conclude that drug quantity must often be treated as an element of the offense under § 841 but that any error was harmless in this case because the indictment charged

memo is not so much that prosecutors have a new discretionary mechanism to eliminate mandatory minimums for particular defendants, but that the Attorney General is encouraging them to use it in a broad, if so-far loosely defined, swathe of drug cases.¹¹⁰ If line prosecutors across the country take the Attorney General at his word, the number of drug cases with mandatory minimum sentences is likely to drop appreciably and we may be on the verge of finding out whether it has been the stickiness of the Guidelines or the straightjacket of mandatory minimums that has kept judges roughly compliant with guideline norms in narcotics cases.¹¹¹

V. ANOTHER CAVEAT ON DISPARITY

All the observations made so far are grounded in national statistics, which requires a caveat about the incidence and effect of regional and inter-judge disparity. Eight years ago, in 2006, writing for the first University of Houston symposium on the post-*Booker* world, I examined the available information on the question of whether *Booker* had produced increased sentence disparities between similarly situated defendants in different regions.¹¹² I concluded that the period since *Booker* was then too short and the evidence too sparse to arrive at any meaningful conclusion,¹¹³ but privately I was moderately confident that the advent of advisory guidelines would in time produce increasing disparities, both between regions and between defendants

Sheppard with conspiring to distribute more than 500 grams, and the jury made a special finding of that quantity.”); see also Memorandum from David G. Ogden, Deputy Att’y Gen., to All Federal Prosecutors 2 (May 1, 2009), <http://www.justice.gov/oip/docs/dag-memo-sentencing-cocaine-offenses.pdf>.

110. The Holder memo encourages consideration of the following factors:

The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person; [t]he defendant is not an organizer, leader, manager or supervisor of others within a criminal organization; [t]he defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and [t]he defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

Holder Memo, *supra* note 99, at 2.

111. This will be doubly the case if any of several bills relaxing the grip of mandatory minimum sentences now pending in the Senate were to receive congressional approval. See FAMILIES AGAINST MANDATORY MINIMUMS, THE PAUL-LEAHY “JUSTICE SAFETY VALVE ACT OF 2013”: PREVENTING LIVES AND MONEY FROM BEING LOST DOWN THE DRAIN 2–4 (2013), available at <http://famm.org/Repository/Files/Justice%20Safety%20Valve%20Act%20Primer%20FINAL.pdf>.

112. Bowman, *supra* note 70, at 314–18.

113. *Id.* at 318.

sentenced by different judges in the same district or region. In truth, the post-*Booker* experience has varied widely depending on one's district. And while there are those who continue to dispute or at least downplay the point, the available data strongly suggests that, and it suggests that there has indeed been an increase in regional and judge-to-judge disparity.¹¹⁴ All three points require some amplification.

A. *Different Districts Have Had Very Different Post-Booker Experiences*

A focus on national averages necessarily obscures local variation. The post-*Booker* story told by national averages is one of gradual, incremental change toward an equilibrium somewhat less punitive, but not terribly different, than the one that prevailed before anyone conceived that the Sixth Amendment represented a threat to binding guidelines. But in some districts, the federal sentencing experience has changed very markedly. As Figure 19 illustrates,¹¹⁵ a few districts adhere to the Guidelines as much or even more than they ever did, while in others the rate of Guidelines compliance has fallen by 40%–50%. Even in the pre-*Booker* era of legally binding guidelines, each federal district always maintained a slightly different equilibrium between strict compliance with the rules and various local accommodations.¹¹⁶ Since *Booker*, a new and sometimes quite different set of local understandings has arisen.¹¹⁷ Thus, one must be very cautious in making sweeping national generalizations about the effect of *Booker*.

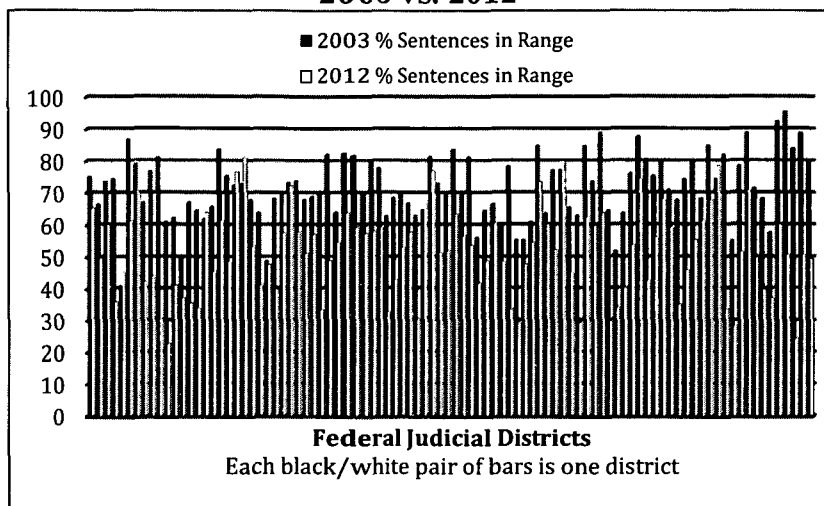
114. Frank O. Bowman, III, *Prolegomenon on the Status of the Hopey, Changey Thing in American Criminal Justice*, 23 FED. SENT'G REP. 93, 97 (2010).

115. The data in Figure 19 are drawn from the 2003 and 2013 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app.B.

116. See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1135 (2001) (analyzing federal drug sentencing data and hypothesizing that “each judicial district has tended to create a local equilibrium in which the customary sentencing players . . . have reached accommodations regarding the commonly occurring issues in Guidelines application”); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 560 (2002) (concluding that federal sentencing actors have adopted “local norms and legal folkways, establishing sentencing practices based on Guidelines rules but full of local idiosyncrasy”); Jawjeong Wu & Cassia Spohn, *Interdistrict Disparity in Sentencing in Three U.S. District Courts*, 56 CRIME & DELINQ. 290, 292, 298, 313–15 (2010) (evaluating national inter-district sentencing disparity based on three similar districts and finding that each district relied on different factors to depart from Federal Sentencing Guidelines).

117. See Yang, *supra* note 92 (reasoning that inter-district disparity relies in large part on different political climates across districts).

**Figure 19: Comparison of Percent Sentences in Range by District:
2003 vs. 2012**



B. Regional Disparity Has Increased After Booker

While there can be no doubt that different districts have responded quite differently to the advent of advisory Guidelines, the question of whether the sentencing practices of federal districts have become more or less disparate than they already were before *Booker* defies precise quantification. A host of variables complicate the problem. Differences in geographic and population size, numbers of defendants, numbers of district judges, mix of case types, and the like make cross-district comparison dauntingly complex. Nonetheless, some general conclusions are possible.

First, there is no general consensus among researchers on the question of whether the advent of the Federal Sentencing Guidelines in 1987 reduced unjustifiable regional sentencing disparities.¹¹⁸ Second, inter-district disparity appears to have increased since the Guidelines became advisory. I have noted this trend on several occasions since 2010,¹¹⁹ and the Commission's most recent figures seem to confirm that it continues.¹²⁰

118. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 96-97 (2004) (noting that some researchers concluded that the Federal Sentencing Guidelines reduced regional disparity, some found no evidence of such a reduction, and some found increased regional disparity).

119. Bowman, *supra* note 114, at 97; Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT'G REP. 356 (2012) [hereinafter Bowman, *Nothing Is Enough*].

120. Compare 2003 SOURCEBOOK, *supra* note 53, at app.B, with 2012 SOURCEBOOK,

What one is trying to determine when assessing inter-district disparity is the degree to which the judges of one district sentence similarly situated defendants differently from the judges of another district.¹²¹ The Guidelines were designed to ensure rough parity in sentencing between similarly situated defendants by identifying factors thought important to sentence severity (drug quantity, loss amount, degree of injury to victims, role in the offense, and so forth), assigning numerical values to those factors, and correlating those numerical values to strongly presumptive sentencing ranges.¹²² Even conceding the many imperfections in the Guidelines scheme, one useful metric of inter-district disparity is a comparison of the degree to which judges in different districts sentence within the applicable guideline range, i.e., degree to which the district judges treat similarly those defendants the Guidelines view as similar. Throughout the Guidelines era, there has always been a considerable degree of variation among districts in rates of Guidelines compliance.¹²³ Nonetheless, a year-to-year increase or decrease in the degree of inter-district variation is one imperfect, but respectable, measure of increasing or decreasing disparity in the sentencing of similarly situated defendants. This is so because, however much districts may differ from each other at any given moment in size, case type mix, and so forth, those factors will tend to remain relatively stable over time within a single district.¹²⁴ Likewise, any significant national trends in case mix or prosecutorial priorities, such as the big increase in immigration prosecutions noted above, will tend to affect many districts and should have relatively little effect on the degree of inter-district disparity in Guidelines compliance.¹²⁵ In short, a

supra note 23, at app.B.

121. See Wu & Spohn, *supra* note 116, at 294 (suggesting many federal sentencing disparity studies focus on identifying similarly situated defendants sentenced differently).

122. See generally U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.2, 2B1.1, 2D1.1, 3B1.1 (2013) (outlining purpose of Federal Sentencing Guidelines, various factors taken into account, and providing the current sentencing table); *id.* at ch. 1, pt. A, ch. 5, pt. A (same).

123. See Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633, 648, 658 (2002) (providing Federal Sentencing Guidelines-era data to present inter-district disparity in sentences for drug-trafficking offenses).

124. See generally U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS SEPTEMBER 2013 (2013), available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-september-2013.pdf>. The different U.S. District Courts have relatively consistent numbers of filings every year, numbers of civil filings per month, and numbers of criminal filings per month. *Id.* These numbers are especially consistent within each district when compared with other districts' numbers. *Id.*

125. Compare U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2007, available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/>

significant increase in the degree of variation in Guidelines compliance among districts would suggest, even if standing alone it cannot conclusively prove, an increase in regionally disparate sentencing of similarly situated defendants. The data show such an increase.

The simplest way to illustrate the trend is by comparing Figures 20A¹²⁶ and 20B,¹²⁷ which are scatter plots showing the percentage of cases sentenced within range in every federal district in 2003, the last statistical year before the *Blakely* decision, and 2012, the last statistical year post-*Booker* for which data are available. Put simply, we are seeing an increase in national systemic entropy. As each local system arrives at its own accommodation between guideline rules and local preferences, districts are diverging ever further from each other and from the pre-*Booker* national norm. The point made visually manifest in these scatter plots can be expressed statistically by noting the standard deviation among all federal districts of the percentage of within-range sentences was 10.28 in 2003 and has jumped to 13.73 in 2012. Figure 21¹²⁸ shows graphically that the standard deviation among districts has increased fairly steadily since 2006, the first full statistical year following the *Booker* decision, and that the rate of increase accelerated beginning in FY 2008, after the December 2007 *Gall* and *Kimbrough* decisions affirming the genuinely advisory character of the Guidelines.¹²⁹

tables/D03CMar07.pdf, with U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013 (2007), available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx> (showing a significant increase in immigration offenses in at least fifty judicial districts when compared with 2007 data). See also *supra* text accompanying notes 39–40.

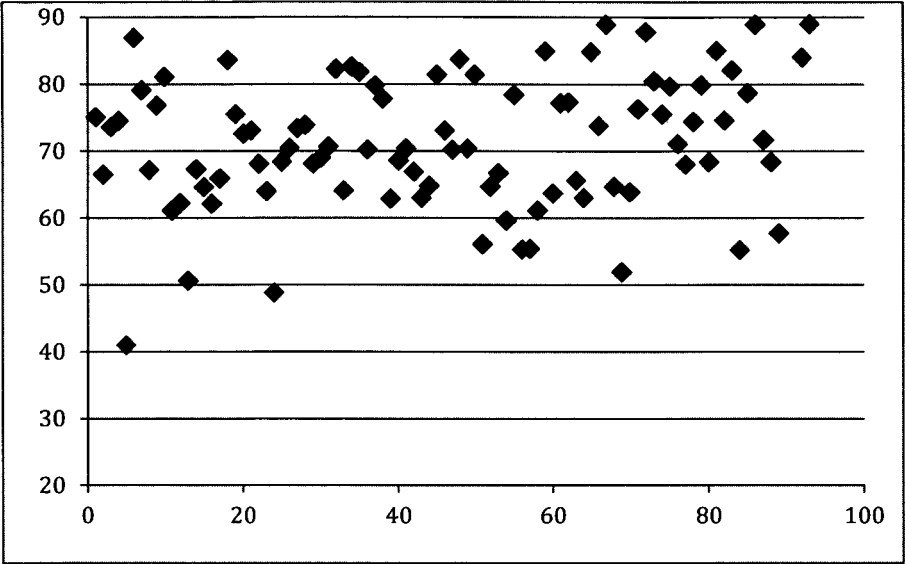
126. 2003 SOURCEBOOK, *supra* note 53, app.B.

127. 2012 SOURCEBOOK, *supra* note 23, app.B.

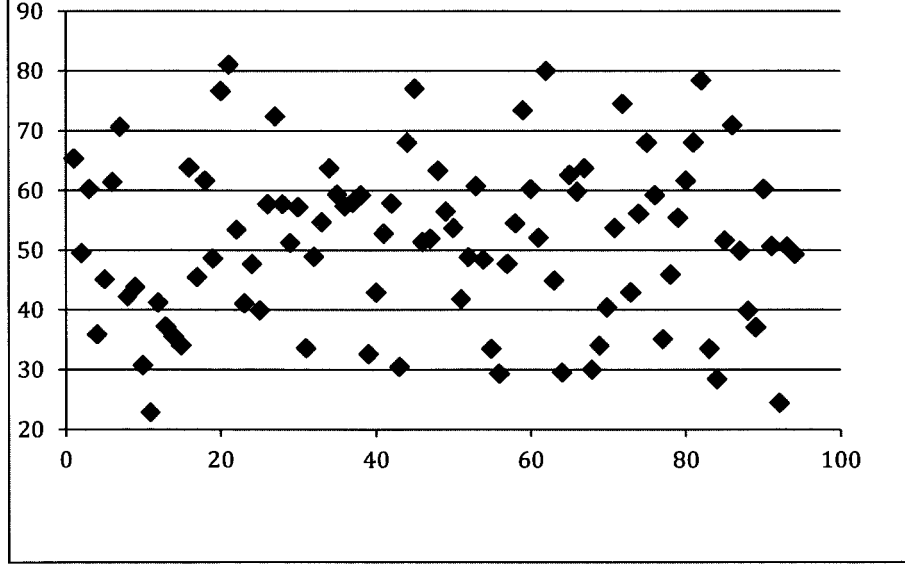
128. The data in Figure 21 are derived from the 2006 through 2012 editions of U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app.B.

129. Several studies have suggested that inter-district sentencing disparities have not increased in the post-*Booker* period. Ulmer & Light, *supra* note 9, at 165–66 (“[I]t appears that inter-district variation in sentencing has changed little so far as a result of *Booker*.”); Jeffrey T. Ulmer, Michael T. Light & John Kramer, *The ‘Liberation’ of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUST. Q. 799, 816 (2011) (presenting results that suggest immediately post-*Booker* “judges were even more reliant on the guidelines”). Although these authors perform far more sophisticated analyses than anything attempted here, I confess to finding them unconvincing. The 2010 article utilizes only data through FY 2007, which ended on September 30, 2007, and thus does not examine the behavior of federal judges in the five fiscal years (FY 2008–FY 2012) after the December 2007 *Gall* and *Kimbrough* decisions in which the Supreme Court made explicit the holding that the Federal Sentencing Guidelines were truly advisory and that the sentencing decisions of district court judges were to be subject to only cursory substantive review by appellate courts. Ulmer & Light, *supra* note 9, at 152. The 2011 article only considers data through the end of FY 2009, Ulmer, Light & Kramer, *supra*, at 804 n.1, and actually finds a

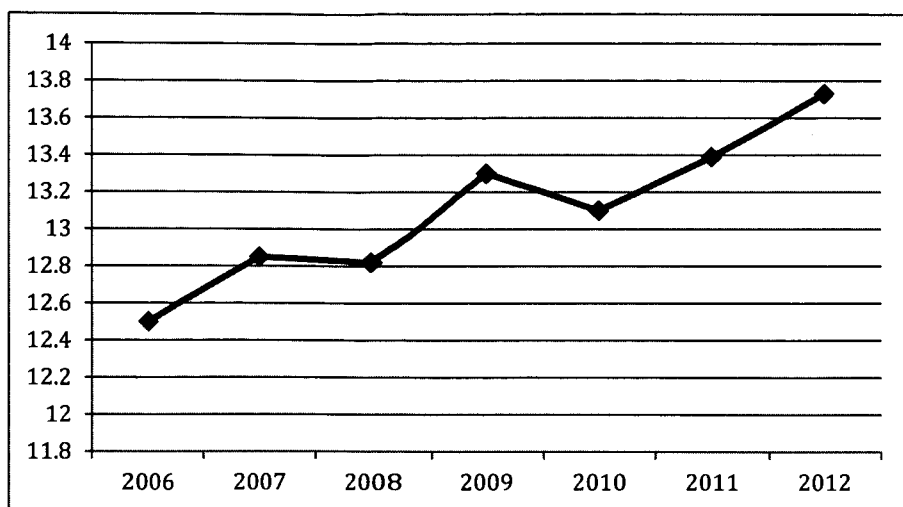
**Figure 20A: Percent Sentences in Range
Fiscal Year 2003**



**Figure 20B: Percent Sentences in Range
Fiscal Year 2012**



statistically significant post-*Gall* increase in inter-district disparity, *id.* at 816 tbl.3A, but judges it insubstantial. However, we now have four more years of post-*Gall* experience and it would certainly appear that the observations of Ulmer, Light, and Kramer about the period through FY 2009 were the beginnings of a continuing trend of increased inter-district disparity. Indeed, if my rough measure of increased disparity in the form of increasing standard deviation among district rates of guideline compliance has any validity, it is from 2010–2012 that disparity really begins to increase most notably.

Figure 21: Standard Deviation Percent Within Range

The next Part will summarize the copious evidence of disparate sentencing practices among individual judges. However, it should be emphasized that the gradual, but steady, divergence among the sentencing practices of the districts doubtlessly reflects not only regional differences in judicial behavior, but differences in the charging and plea bargaining practices of U.S. Attorney's Offices.¹³⁰ Indeed, one can predict with reasonable confidence that one effect of the 2013 Holder memo on mandatory minimum sentences will be an increase in regional disparity as different prosecutors adopt different views on who should and should not be subject to mandatory minimum sentences.¹³¹

C. Inter-Judge Disparity Has Also Increased Since Booker

Despite the lack of consensus on whether legally binding guidelines reduced regional disparity, researchers both inside and outside of the U.S. Sentencing Commission concluded that the Guidelines did reduce sentencing disparity between individual judges.¹³² One would therefore expect that *Booker's*

130. See U.S. SENTENCING COMM'N, FIFTEEN YEAR REPORT, *supra* note 118, at 80 (attributing sentencing disparity to differences among regions and different judges' philosophies); James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 301 (1999) (describing the strong effect the U.S. Attorney's office and its regional charging policies have on inter-district sentencing disparity).

131. Holder Memo, *supra* note 99, at 1 (granting United States prosecutors discretion on prescribing minimum sentences for "non-serious" drug violations).

132. U.S. SENTENCING COMM'N, FIFTEEN YEAR REPORT, *supra* note 118, at 97-99 (reviewing studies and concluding that "[t]he sentencing guidelines have made significant

transformation of the Guidelines from binding to advisory would increase the disparity between sentences imposed by different judges on similarly situated defendants. Although some have tried to dispute or at least downplay this point,¹³³ the weight of the research is now sufficiently great to preclude serious doubt that advisory guidelines increase sentencing disparities between judges.¹³⁴ This is, of course, hardly a surprising outcome. One of the primary objectives of the Guidelines was to cabin the exercise of judicial discretion through the application of mandatory rules and thus lessen the variability of individual judicial decisions. To expect that judges freed of legal constraint would sentence with the same degree of consistency as they did while the constraints were in place is to assume that the presence or absence of binding rules has no effect whatever on human decision-making.

D. Does Increasing Disparity Matter?

The real question at the moment is not whether *Booker* has increased the disparity between the sentences imposed on similarly situated federal defendants, because it surely has, but whether that undeniable increase matters very much. I think it should matter to anyone who believes that one important component of a just system of criminal punishment is that similarly situated offenders are treated substantially similarly. Particularly in a national system of uniform laws, an offender's

progress toward reducing disparity caused by judicial discretion"); Anderson, Kling & Stith, *supra* note 130, at 294; Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 296 (1999).

133. See, e.g., *Fact Sheet: The 2012 USSC Booker Report: Inter-Judge Differences in Federal Sentencing*, DEFENDERS SERVS. OFFICE, [http://www.fd.org/docs/select-topics/sentencing-resources/fact-sheet-on-sentencing-commission's-booker-report-\(addressing-inter-judge-disparity\).pdf?sfvrsn=4](http://www.fd.org/docs/select-topics/sentencing-resources/fact-sheet-on-sentencing-commission's-booker-report-(addressing-inter-judge-disparity).pdf?sfvrsn=4) (last visited Apr. 17, 2014).

134. See U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 98–104 (2012) (concluding that inter-judge disparity within districts has increased since *Booker*); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 35 (2010) (examining the sentencing practices of judges in the District of Massachusetts and concluding that the advent of *Booker* increased inter-judge disparity); Yang, *supra* note 92, at 27, 36, 50; see also Paul J. Hofer, *Data, Disparity, and Sentencing Debates: Lessons from the TRAC Report on Inter-Judge Disparity*, 25 FED. SENT'G REP. 37, 41 (2012) ("I believe TRAC's central claim [that different judges impose different sentences on similarly situated defendants to a statistically significant degree] has been established to a reasonable degree of scientific certainty . . . Something about sentencing judges often has an effect on the sentences they impose."); *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, TRAC REPORTS (Mar. 5, 2012), <http://tracfed.syr.edu/tracreports/judge/274/> (examining federal sentencing data from FY 2007–FY 2011 and finding that "the typical sentence handed down by a federal district court judge can be very different than the typical sentences handed down for similar cases by other judges in that same district").

sentence should not be notably dependent on the region in which the crime was committed or the identity of the judge who imposes the sentence.¹³⁵ Of course, horizontal equity is not the only important principle of just punishment and one might fairly conclude that the benefits of increased individualization of federal sentencing after *Booker* outweigh the costs flowing from increased disparity.¹³⁶

The other way in which increased post-*Booker* disparity matters is that it probably represents the primary political risk to maintenance of the post-*Booker* status quo. At present, there is very little apparent concern among federal political actors about increased judicial sentencing discretion.¹³⁷ If anything, trust in the wisdom of sentencing judges has become something of an article of faith on the liberal side of the spectrum and even the most consistent conservative critics of judicial leniency have been notably quiet for some time. But this phase, too, will pass in time. Sooner or later, uncontrolled disparity will again become a rallying cry.

VI. SOME GENERAL CONCLUSIONS ABOUT THE SURPRISINGLY TENACIOUS SENTENCING GUIDELINES

So what general observations can one make about these Guidelines that will not die? Here I will venture only three:

First, an explanatory speculation. The endurance of the Guidelines, but more particularly the degree to which they continue to drive actual sentences, has surprised nearly everyone. It has pleasantly surprised those who liked the old system (primarily the Justice Department and law and order conservatives in Congress) and feared that judges, once free of mandatory Guidelines, would in short order be throwing wide the prison gates for significant classes of defendants. It has unpleasantly surprised a good many guideline critics (primarily the defense bar, the academy, and liberal sentencing reformers) who privately assumed the same thing.¹³⁸ The cognitive

135. See Scott, *supra* note 134, at 6–7, 28–29 n.167 (arguing that sentencing should not depend upon the “judge’s politics, personality, or biases” and noting that sentence lengths depend upon the policies of local prosecutors).

136. See Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79, 79, 84 (2007) (arguing that post-*Booker* individualized sentencing outweighs the cost of moderate sentencing inconsistencies).

137. See Lynn Adelman & Jon Deitrich, *Rita, District Court Discretion and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 59–60 (2007) (suggesting neither Congress nor the Sentencing Commission are likely to make any changes to the federal sentencing regime).

138. See Douglas A. Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 19–21 (2007) (reasoning that district judges’ continued adherence

dissonance among Guidelines critics has been particularly acute because they have been obliged by their preference for the new system over the old and their fear of a politically-driven “*Booker* fix,” to publicly praise post-*Booker* judges for continuing to adhere closely to the Guidelines while privately cursing them for the same thing.¹³⁹

Why have the judges stuck to the Guidelines so closely? In retrospect, I suppose the mystery is whether any of us expected anything different. Judges are men and women of the law. They naturally look for rules and endeavor to apply them. However badly the Supreme Court may have tangled Sixth Amendment doctrine in *Blakely*, *Booker*, and their misbegotten progeny, to district judges charged with the everyday work of sentencing federal defendants, the Guidelines still look and feel like “law.” Law with some extra elasticity, perhaps, but still law of a recognizable sort, which their professional ethos disposes them to follow. Moreover, this particular body of rules gives guidance in the one area in which judges are most likely to feel in need of it. How, after all, does one go about quantifying punishment for crime? Judges faced with the task are acutely aware of the inevitable subjectivity of the exercise and are customarily grateful for standards provided by officially anointed experts, even if they may not always agree with the experts in particular cases.¹⁴⁰ Hence, though I suspect that judges’ adherence to the Guidelines will continue to slowly erode, there is no reason to think that the Guidelines will not remain central to sentencing decisions indefinitely.

Second, an admonition to practitioners. The Guidelines still matter. They still matter nearly as much as they did on the day before *Booker* was decided.¹⁴¹ Practice accordingly. Because if you

to sentencing guidelines is irrational and a result of status quo biases); Raymond Moore, *Testimony on Behalf of Federal Public and Community Defenders before the U.S. Sentencing Commission, February 16, 2012*, 24 FED. SENT’G REP. 376, 376, 378 (2012) (stating that although making the Guidelines advisory is a step in the right direction, judges still adhere to the Guidelines too often and are “overly-restrained”).

139. See Bowman, *Nothing Is Enough*, *supra* note 119, at 358 (discussing “the surprisingly odd spectacle of folks who spent the first two decades of the guidelines era vehemently denouncing the guidelines . . . now mounting an impassioned defense of a post-*Booker* system that retains virtually every flaw they previously deplored”).

140. See Paul J. Barbadoro, U.S. Dist. Judge, Dist. of N.H., Statement Before the United States Sentencing Commission 9–10 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Barbadoro.pdf (presenting expressions of gratitude from various federal district court judges for the Federal Sentencing Guidelines).

141. See *id.* (presenting many judges who rely heavily on Federal Sentencing Guidelines post-*Booker*); Berman, *supra* note 138, at 20–21 (reasoning that federal judges still adhere to the post-*Booker* status quo of guideline sentencing by properly calculating

do not, your client, whether the government or a defendant, will suffer.

Third, a thought for those who believe that the sentences imposed by federal judges are still wrong in some way—too long, too short, too heavy on incarceration, too light on rehabilitation or restorative justice, whatever. The Guidelines still matter. And given the complete dysfunction of the federal legislative branch, no serious alteration of the basic structure of those Guidelines is likely at any time in the foreseeable future.¹⁴² Therefore, the path to whatever sentencing salvation you seek is through the United States Sentencing Commission. This is itself a rather surprising conclusion because, among federal sentencing cognoscenti, the sotto voce conventional wisdom for some time past has been that *Booker* and advisory Guidelines rendered the Commission a largely irrelevant backwater. As it becomes ever clearer that the Guidelines continue to drive most federal sentences and bid fair to do so for years to come, the Commission has the potential to return to the center of the federal sentencing debate.

guideline sentencing ranges and providing reasoned justification for any deviation from the Guidelines despite *Booker* making the Guidelines advisory).

142. See Adelman & Deitrich, *supra* note 137, at 59 (suggesting Congress is not likely to make any changes to the Federal Sentencing Laws for political appearance reasons).